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MICHIGAN LEGAL STUDIES

SOVIET CIVIL LAW

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SOVIET CIVIL LAW

PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME

Comparative Survey and Translation

of

The Civil Code; Code of Domestic Relations; Judiciary Act; Code of Civil Procedure; Laws on Nationality, Corporations, Patents, Copyright, Collective Farms, Labor; and Other Related Laws

by

VLADIMIR GSOVSKI

Foreword

by

HESSEL E. YNTEMA

VOLUME ONE

Comparative Survey

Ann Arbor

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To my Teachers in Law
Here and Abroad

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Foreword

BY

Hessel E. Yntema

THE original suggestion that led to this work came from the late Guerra Everett, sometime Foreign Law Adviser of the Department of Commerce. In 1940, he informed the writer that an English translation had been made of the Judiciary Law of the U.S.S.R. and of the Civil Code and the Code of Civil Procedure of the R.S.F.S.R., by Mr. Morton E. Kent, formerly of the Bureau of Foreign and Domestic Commerce, but that there were no current funds available for its publication. Thereafter, upon approval of the project by the Faculty of Law of the University of Michigan and at Mr. Everett's instance, the Department generously released all rights in the translation to the University for publication in the Michigan Legal Studies. And it was also upon his advice that arrangements were made to have the translation brought to date by the author, Dr. Vladimir Gsovski, Chief of the Foreign Law Section of the Library of Congress, whose broad legal scholarship, judicial experience in Russia, Yugoslavia, and Czechoslovakia, and special studies in soviet law, exceptionally qualified him for the task.

It has proved a fortunate choice. Dr. Gsovski has completely revised and made many additions to the original translation, and particularly by his extensive annotations to the texts, the most important of which have

become chapters in the first volume, has made the work his own. Due to his industrious interest, what was planned as a translation of the basic documents, has thus also become an exhaustive treatise, in a form which is exceptionally designed to afford authentic information and insight concerning fundamental aspects of the soviet regime. For the first time, it presents in English a compilation and translation of the general laws concerning private rights in Soviet Russia, accompanied by a comprehensive survey and analysis of their provisions, set in the context of their political and social background and in comparison with the analogous doctrines of the laws of Western Europe.

It would be supererogatory to insist upon the timely significance of this work; indeed, it is remarkable that it should have waited thirty years after the November Revolution to appear. Russia is in area the largest country in the world, with an estimated population of over 200,000,000 souls. Lying athwart the Euro-Asiatic mainland, in the West covering more than the eastern half of Europe and reaching in the Far East to the Pacific, it has played an increasingly important part in world affairs since its doors were opened to Western civilization by Peter the Great. Yet this participation has been limited by barriers of language and backwardness in acceptance of the liberal ideas disseminated in the wake of the American and French revolutions, impediments which, during the Nineteenth Century, precluded Russia from occupying a position in Western culture commensurate with its potentialities. In the Twentieth, unexpectedly, as a consequence of World War I, this medieval feudal economy has become the scene of a vast social experiment, a ruthless effort to

realize certain materialistic socio-economic theories advanced in Western Europe especially at the beginning of the present century and purporting to have international significance.

It has been observed that, in initiating this experiment, the founders of the soviet regime accepted two critical compromises with their democratic objectives, namely, resort to revolution by a minority to attain power and centralized control by a bureaucratic party to retain it. In consequence, under the soviet system, achievement of economic and social democracy through the "dictatorship of the proletariat" is at the price of individual liberty, local self-government, and majority rule.

The present work is of especial interest as exhibiting the operation of this system upon private rights and the apparent revival of traditional conceptions under the restrictive conditions of a socialized state. Thus, the State was to "wither away," but this has been postponed indefinitely. There was to be a "classless society," but an official bureaucratic and military caste, resurrecting even the insignia of the Tsars, has appeared. Labor, industrial and rural, for whose benefit the revolution was announced, has been subjected to collectivization and to a system of forced service, with inequalities of wages and controls for regimentation, recalling, if not surpassing, the worst days of capitalistic "wage slavery." Private property was to be abolished, but the conception of property, both "personal" and in the form of land tenancies, is well on the way to being restored; the same is true of inheritance rights. Marriage was to depend upon factual cohabitation, not legal union, with divorce by mere registration; recently, the institu-

tion of civil marriage has been reinforced by divorce laws more restrictive than in most Western countries, and the importance of the family as the basis of society is emphasized. Religion was proclaimed the "opium of the masses"; the Orthodox Church is now seemingly recognized. A former anti-historicism has been succeeded by revival of interest in Russian history as a stimulus to patriotism. The international revolution has been subordinated to Russian nationalism, the policies of which project the traditional ambitions of the Empire. The communist experiment thus seems, from the viewpoint of its official theory, to be retrogressing toward a form of national socialism.

While the purpose of this volume is to provide the English-speaking world with objective information on the regime of private rights thus evolving in Soviet Russia, such information may perhaps indirectly also serve other ends. Russia is the only major European power, saving France, with which the United States has never been at war. On the part of Russia, the traditional amity between the two countries was evidenced by support of the Union at a critical juncture in our Civil War and by the grant of Alaska. On the other hand, apart from the successful mediation of the first President Roosevelt in 1905, which enabled Russia to retire from a disastrous conflict with its holdings in the Far East almost intact, the recent participation of the United States under the second President Roosevelt in the War not yet officially concluded, not only rescued the soviet regime but has permitted it even to extend the boundaries of the Russian Empire and the sphere of Russian influence in Europe and in Asia beyond the more sanguine pretensions of its predecessors. In consequence,

with the recession of British and German influence, the two countries are no longer insulated from each other on the stage of world affairs, and their traditional relations are put to the test of conflicting interests, ideologies, and politics.

Meanwhile, there is no reason to suppose that the respective peoples desire aught but peace. To this, the present work may make two contributions: first, to give the American people additional understanding of what is transpiring behind the Steel Curtain; second, to suggest to those who may be concerned in Soviet Russia that, as the doctrines of communist dialectic have not proved ineluctable, the inevitability of a clash with capitalism also becomes hypothesis. Removal of this mystical apprehension, which apparently has inspired recent soviet policy, would among other things permit the development of normal intercourse with Russia, now barred by formidable obstacles, and the dissemination of reliable information to the public in both countries. These are necessary conditions for the growth of that mutual understanding and confidence upon the only basis of which, now that they must deal with each other, the two countries can rationally resume their traditional amicable relations.

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Preface

In the United States, the Soviet Union is still too little known. Not only the domestic and foreign policies of the soviet government, but also the legal conditions forming the background of everyday life, deserve attention. Soviet law offers ample material on these matters. Nevertheless, numerous books on Soviet Russia in English, written by scholars and observers, treat of soviet economics, foreign and domestic policy, social structure and ideology, but quite inadequately of law. It is not necessarily that soviet law fails for a non-soviet jurist to afford a particularly attractive subject for the required time-consuming study. The scarcity of material outside the Soviet Union and the difficulty of the Russian language are to many forbidding handicaps. In consequence, soviet law at times has been presented by writers who seem to have been guided more by sympathy with the existing regime than by the spirit of analysis. In the result, there is a notable absence of reliable information in English on the laws of Soviet Russia.

But a legal approach to life in Soviet Russia is no less needed than the economic, political, or sociological. The gap is felt not only by lawyers when legal information is required. An analysis of soviet legislation, court decisions, and legal writings concerning marriage, the family life and business of a soviet citizen, may help to delineate the characteristic features of the soviet regime that are of interest for any student of Russia.

There is also an additional ground of interest in a survey of soviet law. For centuries, jurisprudence has been built up and developed in terms of a more or less comparable body of concepts: family, private ownership, individual rights, and the State, the necessity of which was challenged in the original program in the name of which the soviet government assumed the reins of power. What then is the fate under the soviet regime of the legal concepts thus far operative in all civilized societies?

This book seeks to offer material for the answer to questions of this nature. The principal aim of the author has been to inquire into the legal protection and actual exercise of private rights in the Soviet Union, on the basis of an examination of the authentic soviet sources. Extensive quotations from these sources in the discussions in Volume I and full translations of major codes and other enactments in Volume II are intended to help the reader to form his own opinion and to check the conclusions of the author.

An isolated study of the above-mentioned aspects of law, detached from consideration of the related fields of public law, government, and social organization may offer an incomplete and therefore misleading picture. Thus, the present study has been naturally amplified by discussion of these topics in Part One (Chapters 1–6) of Volume I and elsewhere in the book.

Soviet law presents an everchanging picture, but the manuscript could not be endlessly revised. When it went to the press, it was abreast with the soviet legislation as of July 1, 1947. It has been possible to include reference to only a few later enacted provisions. Although most of the citations are to the official editions of the

Civil Code and the Code of Civil Procedure of 1943 and the Code of Domestic Relations of 1944, the recent 1948 editions of these codes only became accessible during the proofreading; hence, while it has been possible to bring the text up to date, the references are not changed.

In the translation, the principal aim has been not merely to translate the words but to give the accurate meaning of each clause in clear English. The number of sentences in the original acts have been preserved, but the tenses have been adapted as required for a legal text drawn in English. One of the major difficulties has been the absence of any commonly accepted English equivalents for legal terms of the civil law countries from which the soviet legal terminology is derived, to say nothing of specific soviet terms. In some instances, a term has been paraphrased, in others it has been coined. The generous and most useful advice, in this as well as in many other respects, of Professor Hessel E. Yntema, the editor, is hereby acknowledged. The author feels greatly indebted to him for a happy solution of many seemingly insoluble problems.

The use of untranslated Russian words or abbreviations such as *Kolkhoz* or *Sovnarkom* has been avoided, and English equivalents (collective farm, Council of People's Commissars) have taken their place. Russian expressions which appear parenthetically are given in a phonetical transcription without adhering to the Russian spelling. The same applies to the Russian names in the text. In the bibliography, names and titles are transliterated according to the rules of the Library of Congress, but omitting the diacritical marks.

In order to make plain to the reader, unfamiliar with the Russian language, the type of material referred to,

the Russian titles in the footnotes are given in their English translation. It is parenthetically explained that the publication is "in Russian," except in the case of frequently cited publications included in the list of abbreviations in Volume Two.

The author acknowledges his great debt to the University of Michigan Law School, in particular to Dean E. Blythe Stason and Professor Hessel E. Yntema, for their initiative and sponsorship of this book. It is solely through their interest and support, that this study, which the author pursued for many years, could be completed and printed. The scholarly and friendly guidance of Professor Hessel E. Yntema, who has spared no time in revising the manuscript in all its phases, is deeply appreciated. Special mention should be made of the indispensable and painstaking assistance in the preparation of the manuscript by Miss Virginia Taylor and Mrs. Dolores M. Tewell.

The author also acknowledges the valuable assistance of the rich facilities of the Law Library of the University of Michigan Law School, which were placed at his disposal during his work in residence in Ann Arbor, by the courtesy of Professor Hobart Coffey and Miss Esther Betz.

My colleagues at the Law Library of Congress have been most helpful, especially Mr. Edmund Jann and Dr. Fred Karpf, of the Foreign Law Section, who kindly read the proof and the greater part of the manuscript. The helpful advice of Miss Anida Marchant, formerly of the Law Library of Congress, and the assistance of Mr. Joseph G. Tomascik, Esq., and Dr. Elio Gianturco are hereby acknowledged. Dr. Naum Jashy kindly made valuable suggestions on chapters dealing with agrarian

legislation. My wife, Helena Marta Gsovska, faithfully assisted me in all phases of my work.

Last but not least, only the rich collection of the Library of Congress and especially of the Law Library made this study possible. Full use of the Russian collections was made possible through the courtesy of Messrs. Nicholas R. Rodionoff, Dimitry D. Tuneeff, George A. Novossiltzeff, John Th. Dorosh, Dr. Serge Yakobson, and Mrs. Anna G. Dantzig. The co-operation of the Columbia University Press, Cornell Law Quarterly, Iowa Law Review, and New York University Law Quarterly Review, as well as of P. F. Collier and Son Corporation, is gratefully acknowledged.

VLADIMIR GSOVSKI

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[Note: See Volume II for list of abbreviations, bibliography, index, and continuation of table of contents.]

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PART ONE

GENERAL SURVEY

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Chapter 1

Initial Stages of the Soviet Regime

I. Preliminary

Soviet private law remains inaccessible to the American lawyer and scholar. There are no books dealing with it in English, and the few articles scattered through law reviews have barely touched upon the subject. The term private law is used here to designate the body of law governing property, contracts, torts, succession and inheritance, and similar topics. The use of the term civil law,[1] which may equally apply to this field, has been avoided in this connection, because to an American reader it more frequently connotes, not the above-mentioned topics, but rather the legal system of European countries evolved from Roman law, in contrast to the common law of England and America.[2]

The present work has been undertaken with the aim of offering to American lawyers and scholars authentic soviet source material for the study of soviet private law at the present stage of its development. However, in the quest for a basic soviet source for such a study,

[1] Literal translation of *Grazhdanskoe pravo, droit civil, Zivilrecht, diritto civile.*

[2] The term private law is used in the book primarily to designate the body of rules governing the above topics and not in opposition to public law. In the latter sense, the soviet private law shows in many aspects features of public law. For instance, land tenure is more a matter of public than private law. The recent soviet authors contend that the distinction between private and public law is of no use for soviet law. In a way, all of the soviet law is public. 1 Civil Law (1944) 24. This problem is discussed *infra,* p. 200 *et seq.*

one is confronted with considerable difficulties rooted in the nature of the material. A soviet textbook on private law has recently characterized the soviet legal sources as follows:

> Our [soviet] civil legislation is not co-ordinated; it is scattered, and presents a huge bulk of material containing many obsolete statutes no longer applied in fact, but still not yet abrogated; it has many gaps, many conflicts between individual statutes, and many other shortcomings.[3]

This characterization, given in 1936, still obtains. It is true that to a lesser degree analogous observations may be made on the legislation of almost any country. All legal systems of the world are subject to change with the times, and none of them may justly claim to be without certain contradictions and some obsolete provisions. But the velocity of changes, the sharpness of the turns, and the range of discrepancies between the rules as they appear on the statute books and those actually applied—these are striking characteristics of Soviet Russia. Soviet law in general, and soviet private law in particular, passed in a brief period through several stages, each reflecting a distinct turn in the major lines of soviet social and economic policy. In its present stage, the sources of soviet law still bear the traces of its past phases. Therefore, the term "code" by which some of the soviet statutes are designated (e.g., Civil Code, Code of Civil Procedure, Land Code, Labor Code) does not imply that these statutes include such comprehensive and systematic presentation of legal principles as is otherwise expected from a European legal code.

It is true that a "code," as viewed by a recent soviet

[3] Rubinstein 31.

textbook on private law (1938), is supposed "to represent, as a rule, a systematic exposition in a single legislative enactment, of the sum total of legal rules relating to a certain field of law." In a code, according to the same source, "all the component parts must have an internal co-ordination and must, as a whole, offer an exhaustive answer to all the needs of legal actuality." [4] However, the civil codes to be found in each of the constituent republics of the Soviet Union,[5] though practically uniform in content, do not meet the requirements set forth by the textbook. Unlike the civil codes of other European countries (France, Germany, Italy, Spain, etc.), the civil codes of the soviet republics have not been framed and enacted during a stable period.

The first soviet Civil Code for the major soviet republic, the R.S.F.S.R. (Russian Socialist Federated Soviet Republic), the pattern for all other soviet civil codes, was adopted on November 11, 1922, and took effect on January 1, 1923.[6] At that time the soviet social economic order was far from crystallized. On the contrary, soviet leaders found themselves at the crossroads. The direct attempt to achieve a socialist order as visualized by the prerevolutionary theorists, which had been followed during the first years of the soviet regime, was suspended, and a compromise with capitalism within the country was sought. It was the period of the so-called New Economic Policy (N.E.P.), which was defined by Joseph Stalin in 1926 as "a policy of the [Communist] Party permitting a struggle by socialist elements with the capitalist elements but aimed

[4] 1 Civil Law Textbook (1938) 47.
[5] For discussion of the civil codes of the other soviet republics, see Volume II, comments to Section 1 of the Enacting Law.
[6] R.S.F.S.R. Laws 1922, text 904.

at the victory of the former over the latter."[7] This definition made in retrospect, though perhaps not accurate in expressing the initial stage of the policy, states precisely its unstable and transitory nature.

About 1929, this policy gave way to the Five-Year Plan, the aim of which was: "to exterminate the capitalist forms of economy and . . . to create such an industry as would be able to re-equip the whole of the economy on a socialist basis . . . to create an economic basis for the abolition of classes in the U.S.S.R. and for the construction of a socialist society."[8] At a later period, the new federal Constitution, enacted in 1936 and now in force, announced that "the economic foundation of the U.S.S.R. consists in socialist economy (Section 1)."

Thus, not only were numerous acts passed after 1923, when the Civil Code was enacted, which directly and indirectly affected the Code, but also the basic principles of soviet policy were changed. Therefore, the value and significance of the Civil Code was challenged by many soviet jurists of importance. Krylenko, at one time Commissar for Justice, and a noted public prosecutor, stated in 1933 that the Civil Code is sixty per cent inapplicable and this portion is thus dead law.[9] A vivid discussion of the nature of the Code ensued. Its capitalist and socialist elements and basic principles were scrutinized, but eventually its authority was reinstated, though with some reservations. A more detailed account of the discussion is given *infra*,[10] but here it suf-

[7] Stalin, Problems of Leninism (in Russian 10th ed. 1938) 146.
[8] Stalin's Address to the Central Committee of the Communist Party, January 7, 1933, *id.* 485, also *id.* (English ed., Moscow 1940) 409.
[9] Bulletin of the Third Session of the XVth Central Executive Committee of the R.S.F.S.R. (in Russian 1933), No. 16, 11.
[10] See Chapters 5 and 6.

fices to quote the pronouncements of the soviet jurists expressing the current point of view.

In discussing the attitude toward the Civil Code of Krylenko and his followers, the soviet textbook of 1936 states as follows:

> The Civil Code is the expression in legislation of the soviet economic policy of the first years of the New Economic Policy. . . . What should the attitude to the Code be now [1936]? The opinion that the Code must be repudiated as a whole, because its starting point was the protection of private ownership of the means of production, is wrong and politically inadmissible. In the first place, the Civil Code has admitted such ownership to a limited extent only. In the second place, the Code has secured commanding heights for the proletarian dictatorship. . . . Many other portions of the Civil Code have also maintained their significance (e. g., statute of limitations, torts, inheritance). However, it is beyond doubt that, in large part, the provisions of the Civil Code, though not formally abrogated, have been abolished by the successes of the socialist reconstruction and the majority of these in fact have been replaced by new laws, issued without repealing the respective obsolete provisions of the Civil Code.[11]

The more recent textbook of 1938 is even more categorical in support of the authority of the soviet Civil Code:

> Certain rules of the Civil Code designed for the private economic activities of capitalist elements previously admitted into our country have undoubtedly lost their significance. Although they were not formally repealed, the extinction of their effect may be established by comparison with the wording of special laws. . . .
>
> Only the sworn enemies of socialism may have alleged, for the purpose of discrediting the soviet laws, as did Krylenko, for instance, that our Civil Code is 60 per cent inoperative and is in that part a dead law.
>
> The existence of some antiquated formulas and of state-

[11] Rubinstein 33.

ments that have lost their practical significance in no way disparages the Civil Code as a whole.[12]

Against this background, it has seemed to be most appropriate in the present study to translate the text of the Civil Code, as officially amended up to July 1, 1947, together with the most important indirect amendments, decisions of the soviet courts, and other authorities and comments by the soviet jurists.

Although the Soviet Union (U.S.S.R., the Union of Soviet Socialist Republics) is a federation and there are separate civil codes in each of the sixteen soviet republics, soviet private law represents a body of uniform provisions although contained in many state codes. The Civil Code enacted in 1922 in the old established and the largest state—the R.S.F.S.R. (the Russian Socialist Federated Soviet Republic) either was directly put into effect in other soviet states or was closely followed by their own codes. All the civil codes were uniformly amended by the federal legislation. In view of the foregoing, the R.S.F.S.R. codes and federal enactments are translated but the essential departures from the R.S.F.S.R. codes are for the most part indicated in the comments to individual sections. In the absence of such indications, it may be presumed that the provisions of the R.S.F.S.R. Code enjoy a nationwide recognition.

In contrast to the majority of civil codes of other countries, the soviet codes do not regulate land tenure, domestic relations, and labor law. To give a more comprehensive picture of the soviet private law, selected material pertaining to this field as well as to copyright

[12] 1 Civil Law Textbook (1938) 49, 50. The most recent textbook is satisfied with a brief statement to the effect that "the systematized legislative material on soviet private law is given in the civil codes of the soviet republics." Zimeleva, Civil Law (in Russian 1945) 6. Compare 1 Civil Law (1944) 30.

and patent law and not available elsewhere in English is also translated. A translation of the Judiciary Act of 1938 and the Code of Civil Procedure with some supplementary legislation may help the reader to get a view of the soviet machinery administering justice in civil cases.

The letter of the statute is in itself no more than a framework of a legal system. This is especially true of the Soviet Union which evolved out of a radical social revolution. Soviet law cannot be understood without its social and political background and without some historical information. Moreover, on many points the soviet law shows particular features which have no precedent. It was felt appropriate, therefore, to introduce the legislative texts by a discussion both of the background and the outstanding specific features of the soviet private law. These discussions form the first volume, while the second consists of the translations of the soviet laws, decrees, and other acts. Observations of a more narrow and technical nature are to be found in the comments to the particular chapter or section of the code or other enactment.

It is more or less commonly accepted by soviet and nonsoviet scholars and observers that four definite stages may be distinguished in the development of the soviet regime:

A. Militant Communism (1917–1921),
B. New Economic Policy (N.E.P. 1922–1929),
C. Transitional Period under the First Five-Year Plan and the Collectivization of Agriculture (1930–1936),
D. Stabilization under the 1936 Constitution and New National Policy (1936–).

II. Militant Communism (1917–1921)

The initial stage of the soviet regime is usually called in Russian *Voennyi Kommunism,* which term may be translated with equal propriety as War Communism or Militant Communism. It was a period of War Communism because both civil war against the opponents of the soviet regime and foreign intervention formed its background. It was a period of Militant Communism because the soviet government tried to enforce a rigid communist social order by radical measures erasing the hitherto existing institutions.

The government aimed to be the exclusive owner of land, industrial and commercial establishments, and the only producer and distributor of commodities. It intended to do away with all private property exceeding bare needs of consumption. By November 30, 1918, the soviet government announced a general repudiation of all old laws and court decisions.[13] But before and after this occurred, a series of decrees had nationalized various properties and activities, i.e., converted them into governmental ownership or monopoly. Abolition of all private ownership of land, implied in the Decree of November 8, 1917, was definitely declared on February 19, 1918.[14] In urban settlements with a population of 10,000 or more, private ownership of buildings exceeding in value or income the limits defined by local authorities was abolished. Such buildings were ordered to be taken over by the local soviets.[15] The Decree of January 23, 1918, on the Separation of State

[13] Statute on the Judiciary of November 30, 1918, R.S.F.S.R. Laws 1917–1918, text 889, Section 22, Note. For more details, see Chapter 8, II and Volume II, comment 2 to Section 6 of the Enacting Law.

[14] R.S.F.S.R. Laws of 1917–1918, texts 3 and 346. See Chapter 19, II.

[15] *Id.*, text 674. For details, see Chapter 8, IV, 1.

and Church especially declared the confiscation of all church properties and prohibited churches from owning any property whatsoever in the future.[16]

Inheritance was abolished,[17] stocks and bonds were "annulled," [18] and savings practically confiscated.[19] Copyrights[20] and patents[21] were subjected to government monopoly.

Banking,[22] insurance businesses,[23] and foreign trade[24] were declared government monopolies, and all private establishments engaged in such activities were confiscated without indemnity.

Merchant marine and private river craft,[25] as well as railways,[26] were declared in governmental ownership.

As regards industry, the labor control over management declared on November 27, 1917, soon gave way to a series of measures leading towards general nationalization. A Supreme Economic Council (*Vysshi Sovet*

16 *Id.*, text 268, Sections 12, 13; also *id.*, text 685, Sections 1–25. See Chapter 11. For a discussion of the property status of the Church, which obtains up to 1941, see Gsovski. "The Legal Status of the Church in Soviet Russia" (1939) Fordham Law Review 1.

17 April 27, 1918, *id.*, text 456. See also Chapter 17, Inheritance Law.

18 Decree of January 28, 1918, R.S.F.S.R. Laws 1917–1918, text 353; also *id.*, text 834. See also Decree of March 4, 1919, *id.* 1919, text 108, and the decisions of the Arbitration Commission attached to the Council of Labor and Defense of October 16, 1924, 1 Decisions of the Arbitration Commission (in Russian 1924) 98, No. 400; also Nakhimson, Commentary 76.

By the Decree of January 28, 1918, all foreign loans also were repudiated.

19 Decree of January 28, 1918, *id.*, text 353, Section 10. Opening of bank safes was decreed on December 17, 1917, *id.*, text 151.

20 November 26, 1918, R.S.F.S.R. Laws 1918, text 900.

21 June 30, 1919, *id.*, text 341.

22 December 17 (30), 1917, R.S.F.S.R. Laws 1917–1918, text 150; also *id.*, text 295.

23 November 28, 1918, *id.*, text 904.

24 April 22, 1918, *id.*, text 432; June 11, 1920, *id.* 1920, text 295; March 13, 1922 (still in force), *id.* 1922, text 266: "Foreign trade of the R.S.F.S.R. shall constitute a government monopoly." See also Volume II, Civil Code, Section 17 and comment.

25 January 26, 1918, R.S.F.S.R. Laws 1917–1918, text 290.

26 June 28, 1918, *id.*, text 559, Section 26.

Narodnogo Khoziaistva) was established on December 5, 1917, for the governmental management of business and was granted broad powers to confiscate private enterprises.[27] First, there were a limited number of decrees sequestrating or confiscating individual enterprises, sometimes as a penalty against the owner who had defied one soviet decree or another, or for other reasons.[28] Then, on June 28, 1918, a more general order for the confiscation of big business was promulgated, affecting enterprises whose capital exceeded a certain amount, which varied from 300,000 rubles ($150,000 at par) to 1,000,000 ($500,000 at par), depending upon the type of business.[29]

Finally, on November 29, 1920, the Supreme Economic Council issued an order declaring the nationalization of all industrial establishments employing ten or more workers, or even five or more workers if with motorized installations.[30] On July 7, 1921, the maximum number of workers permitted was raised to twenty.[31]

However, the actual confiscations of that period to a great extent were accomplished as matters of fact and of discretion by local authorities. Some enterprises not contemplated by the government decrees were taken over in this way; others legally nationalized remained in the possession of the owners or were closed. This created, with the inauguration of the New Economic Policy in 1922, a confusing situation, which is discussed

[27] R.S.F.S.R. Laws 1917–1918, text 83, Section 3; see also Decree of August 8, 1918, *id.*, text 644. Re labor control, *id.*, text 35.
[28] E.g., *id.*, texts 140, 190, 191, 192, 234, 546.
[29] *Id.*, text 559. Re oil industry, *id.*, text 546.
[30] R.S.F.S.R. Laws 1920, text 512, Sections 1, 2.
[31] *Id.* 1921, text 323. See also Chapter 8, IV, 2.

elsewhere.[32] Here it suffices to note the wide range of the intended nationalization of industry.

Commerce by private persons was actually suppressed, and, moreover, the People's Commissariat for Food Supplies, created on April 2, 1918, was charged by the Decree of November 21, 1918, "to take the place of private commerce providing for all articles of personal consumption and household effects."[33] The government claimed the monopoly of all crops and the grain trade.[34] At the end of 1920, several decrees appeared ordering the abolition of any payment for rationed food, consumption staples, fuel, housing with all communal services, forage, printed matter, and postal and telegraphic services.[35]

The management of the nationalized businesses was highly centralized in the hands of the bureaus of the Supreme Economic Council charged with the individual branches of business—so-called *Glavki* (from Russian *Glavnyi Komitet*—Main Bureau or Chief Board). These not only planned and supervised but sought to manage in detail all operations of establishments under their control. Their financing was done through the governmental budget after the fashion of regular governmental agencies. Individual enterprises exchanged their goods without any payment on orders of the central administration.[36]

The immediate management of individual enterprises

[32] See Chapter 8, IV, 2.

[33] R.S.F.S.R. Laws 1917–1918, texts 398, 879, Section 1; see also *id.*, text 498.

[34] *Id.*, text 346, Section 19, also *id.*, text 468, and *id.* 1919, text 106. For details, see Chapter 19, II.

[35] October 11, December 4, and December 22, 1920, R.S.F.S.R. Laws 1920, texts 422, 505, 531.

[36] 1 Civil Law Textbook (1938) 31; 1 Civil Law (1944) 49, 162. R.S.F.S.R. Laws 1919, texts 107, 108; *id.* 1920, text 305.

was vested in boards and not single directors. Factory workers' committees participated in the executive affairs. All wages throughout Russia were standardized and leveled, allowing only for a small difference between the higher and lower brackets; wages for manual labor were brought close to the salaries of executives and high governmental officials.[37]

The Labor Code of 1918 established universal compulsory labor duty for all able-bodied men and women between the ages of sixteen and fifty.[38]

Numerous decrees sought to introduce socialism in agriculture. At first, schemes of theorists of agrarian socialism were written into elaborate laws aiming at the equal distribution of all the agricultural land of Russia among those who would till it by their own labor.[39] Private ownership of land was abolished and "personal labor" was declared to be "the fundamental source of the right to use the land."[40] Any conveyance by private transaction of the right to use the land was prohibited. Later, the soviet decrees more expressly pronounced the governmental ownership of land (nationalization of land) and sought to place the land at the disposal of government agencies for the purpose of organizing collective forms of land tenure: government farms (*sovkhoz*) and "agricultural communes." "All kinds of individualistic land tenure will be considered

[37] E.g., Decree of November 23, 1917, R.S.F.S.R. Laws, text 46; Decree of June 27, 1918, *id.*, text 567, especially Section 4; September 22, 1918, *id.*, text 747; October 18, 1918, *id.*, text 815; also *id.*, texts 552, 776, 839.

[38] R.S.F.S.R. Laws 1917–1918, text 905. For its English translation, see Russian Code of Laws of Labour, edited by the People's Commissariat for Justice (1919), published in Russia, and the Labor Laws of Soviet Russia, Soviet Russian Pamphlets, No. 1, Russian Soviet Government Bureau (4 editions, 4th ed. N. Y. 1921).

[39] See Chapter 19, p. 691 *et seq.*

[40] Decree of February 19, 1918, R.S.F.S.R. Laws 1917–1918, text 346, Sections 12, 13, quoted *id.*

transitory and to be passing away," stated a Decree of February 14, 1919.[41]

But, in fact, the decrees concerning land tenure issued during this period reflect more the program of the government than what was actually happening in the countryside. The great agrarian revolution went on, the big and small landowners were dispossessed, and the land was redistributed by peasants regardless of the soviet decrees and their aims. The old-fashioned village commune (*mir*) such as existed under the imperial regime prevailed. No equalization on a nationwide scale took place. Land was redistributed among local peasant populations, and landholdings were equalized within narrow districts, primarily the townships, without any important increase of acreage for the majority of peasants.[42] The possession of land remained unsettled; the disputes and redistribution of land between and within the villages went on and on.

The attempts of the soviet government to enforce rigidly the government monopoly of crops resulted in sharp conflicts with the peasantry. All private trade in foodstuffs was forbidden.[43] All surpluses above the consumption need of the farmer, set by the government at an extremely low level, were to be delivered to the government at fixed prices equal to confiscation (*prodrazverstka*).[44] Special military detachments sent to villages for the collection of grain often abused their power.

Militant Communism in the countryside resulted, according to Lenin's statement of the policy of the soviet

41 R.S.F.S.R. Laws 1919, text 43, Sections 3, 61.
42 Land Law (in Russian 1940) 44; also Chapter 19, pp. 694, 696.
43 R.S.F.S.R. Laws 1917–1918, text 346, Section 19; *id.*, text 468; *id.* 1919, text 106.
44 R.S.F.S.R. Laws 1917–1918, text 468; *id.* 1919, text 106.

government, "in actually taking away from the peasants all the surpluses and occasionally, not only the surpluses, but a part of the food needed by the peasants for their own consumption."[45]

But the most outstanding feature of the period of Militant Communism is that actual dispossessions and confiscations were more often made by the individual soviet authorities on their own initiative and were neither based upon nor followed by a decree or any formal act. Not for every confiscation of that period can a specific legal authority be found. Some of these factual seizures were nevertheless elevated to a title by the Civil Code of 1922[46] and other enactments of the next period, provided the seizures had taken place before a certain date.[47] Vice versa, properties confiscated but not seized before a certain time were subject to recovery by the owner.

At any rate, the measures taken by the central and local soviet authorities from 1918 to 1920 barred practically any initiative in business, extinguished the hitherto existing private rights, and prevented their acquisition in the future. Private property rights in particular were completely denied, and, in the words of a soviet jurist, problems of law were overshadowed by those of pure management of multifarious affairs taken over by the government.[48]

To this it must be added that courts practically did not function during the period of Militant Communism.

[45] Lenin, 26 Collected Works (2d Russian ed.) 332.
[46] Enacting Law, Sections 2, 3, 7. Civil Code, Section 59, Note 1. See also Chapter 8 and comment to these sections.
[47] E.g., industrial establishments: Decrees of May 17, October 27, and December 10, 1921, R.S.F.S.R. Laws 1921, texts 240, 583, 684; houses: Decree of December 1, 1924, *id.* 1924, text 910. See Chapter 8, IV, 2.
[48] Arkhippov, "Principal Phases in the Evolution of the Soviet Concept of Law" (in Russian 1925) Soviet Law No. 5, 30.

All the prerevolutionary judicial institutions were dissolved *en bloc* on December 7 (November 24, old style calendar), 1917, and the new people's courts were under constant reorganization. Five decrees on the judiciary were promulgated in the course of one year, changing the organization of the courts.[49] Three of these decrees were not even enforced,[50] and three subsequent ones, according to the soviet writers,[51] were carried out only to a limited extent. Thus, even if there were private rights, there was hardly any apparatus for their protection.

Speaking of the period of Militant Communism, a soviet jurist said that perhaps the only relation regulated by private law to be found at that time[52] was the contract of a village with the shepherd of the community herd. This is, of course, an exaggeration—the old private laws and rights having shown much more vitality.[53] It is, however, characteristic of the contemporaneous point of view of the soviet jurists. Many of them (like the nonsoviet students of soviet law) who wrote during the next period of the New Economic Policy (1923–1929), looked at Militant Communism as a completely bygone stage and saw the beginnings of soviet "law" only in the legislation of the period of the New Eco-

[49] Decree No. 1 on the Courts of November 24, 1917, R.S.F.S.R. Laws 1917–1918, text 50; Decrees No. 2 and No. 3, February and July, 1918, *id.*, texts 420 (changed to 347 in the reprinted edition) and 589; Instruction of July 23, 1918, *id.*, text 597; Statute (Polozhenie) of July 23, 1918, *id.*, text 889.

[50] Viz., Decrees Nos. 2 and 3 and the instruction cited *supra*, note 49; see Krylenko, The Judiciary of the R.S.F.S.R. (in Russian 1923) 60, 62; Estrin, 1 Course of the Soviet Criminal Law (in Russian 1935) 110.

[51] Viz., Statute of 1918, Statutes of August 21, 1920 (quoted in Krylenko, *op. cit.* 265), and October 21, 1920, R.S.F.S.R. Laws 1920, text 407; Krylenko, *id.*

[52] Goikhbarg, Economic Law (in Russian 1923) 3.

[53] See Chapter 8; also Chapters 18 and 19.

nomic Policy.[54] It looks different now, in 1947. Some basic principles stated by soviet decrees during Militant Communism were carried intact throughout the New Economic Policy, were confirmed by the 1936 Constitution, and are still applied. These principles may be defined as the exclusive ownership by the State of basic economic resources (land, water, industry, etc.), of government monopoly of major economic activities (banking, insurance, foreign trade), and of the ultimate governmental control of private property rights admitted within this scheme (see *infra,* Chapter 16).

During Militant Communism an important change was made in the field of domestic relations. Civil marriage was substituted for religious marriage,[55] which had been the dominant form under the Russian presoviet law.[56] Although the soviet concept of marriage,

[54] This is true of the writings of Wolfson, Kantorovich, Goikhbarg, Malitsky, Stuchka, Novitsky, and others among the soviets. This is also the attitude of the two extensive works issued by the Russian emigrant jurists in Prague, viz., The Law of Soviet Russia (in Russian, Praha 1924), 2 vols., and Traité de Droit Civil et Commercial des Soviets by B. Eliachevitch, Baron B. Nolde, etc. (1930), 3 vols. Also, Freund, Das Zivilrecht Sowjetrusslands (1924).

[55] Law on Civil Marriage, R.S.F.S.R. Laws 1917–1918, text 160; Decree on Divorce, *id.*, text 152; Code of Laws on Acts of Civil Status, Marriage, Family, and Guardianship of 1918, *id.*, text 818.

[56] The imperial Russian laws dealing with marriage in general, embraced in the Civil Code (Vol. 10, Part 1 of the Code of Laws) required, for the validity of a marriage among persons of Christian denominations, a religious marriage ceremony (Sections 1 *et seq.*, 31, 33, 61, 63). But marriages of so-called Old Believers (sectarians within the Russian Orthodox Church) had to be registered by the police "to acquire the force and effect of a legitimate marriage" (Section 78). With regard to persons of other than Christian denominations, the law required the celebration of their marriages "in accordance with the rules of their law, or established customs, without participation of civil authorities or Christian ecclesiastical government" (Section 90). Thus, in the case of non-Christians, the Russian law required religious marriage only inasmuch as such marriage was also required by the rules of a given denomination. With regard to marriages among the Jews, the Russian law was somewhat vague. On the one hand, the note to Section 1325 of the Statute on Ecclesiastical Affairs of Foreign Denominations (as amended in 1912) stated that "marriages which were not celebrated by rabbis or their assistants are invalid." On the other hand, ac-

family, and divorce underwent changes in 1926, 1936, and especially in 1944,[57] civil marriage remains the only form of marriage recognized by soviet law. The con-

cording to Section 90 of Vol. X of the Code of Laws quoted above and the Decision of the Rabbinical Council Approved by the Minister of the Interior of March 29, 1910, "a marriage celebrated by any Jew in a proper manner, even in the absence of a rabbi or his assistant and without any registration . . . shall be considered valid on the ground of the interpretation of the Talmud" (2 Laws Concerning Jews, compiled by Gimpelson in Russian 1915, 659, 667). In the Russian part of Poland, special legislation was in force.

The Russian Supreme Court, ecclesiastic courts, and high executive authorities firmly established the doctrine that marriage of Russian citizens, in order to have legal effect, should conform to the rules of Russian law, regardless of whether such marriages were celebrated in Russia or abroad. See Baron Nolde, Marriage and Divorce, 1 Civil Laws (Code of Laws, Vol. X, Part One), A Practical and Theoretical Commentary, edited by Vorms (in Russian 1913) 67–70; also Mandelshtam, The Hague Conference on Codification of Private International Law (in Russian 1900) 53–59.

Divorce was a well-established institution of the Russian imperial law. In contrast to the Canon Law of the Roman Catholic Church, the dogma of the Russian Eastern Christian Church permitted divorce. In the olden times divorces were comparatively freely granted by parish priests. In the nineteenth century, divorce was regulated by civil legislation, which stated the grounds for divorce, applying to the communicants of the Russian Eastern Church and Lutherans, but for persons of other denominations, referring to the rules of their religious faith. Under the Canon Law of the Roman Catholic Church, no divorce but only annulment of marriage or separation could be granted to Catholics. Members of the Eastern Christian Church could be divorced by the ecclesiastical courts on the grounds of adultery, impotence, conviction connected with the loss of civil rights, absence without notice of whereabouts for a period of five years, or the taking of monastic vows (Civil Code, Sections 45–56). Additional grounds were allowed by law to Lutherans (Statute on Foreign Denominations, *Svod Zakonov* Vol. XI, Part 1 (1891 ed.) Section 369). Divorces among non-Christians were regulated by the rules of the denomination concerned. Conversion of a spouse to Christianity also constituted grounds for divorce under certain circumstances (Civil Code, Sections 79–84).

The civil courts had jurisdiction over divorces between the sectarians of the Russian Church ("Old Believers") (Code of Civil Procedure, Sections 1356^{1}–1356^{9}, as amended in 1906 and in 1914). Moreover, the civil courts could grant separation to spouses of any denomination, if the marital life appeared to be unbearable, and determine also the custody of the children and the provision to be made for maintenance and support (Law of March 12, 1914, Imperial Laws 1914, text 902; Civil Code, Sections 103^{1}, 106^{1}, 164^{1}, as enacted in 1914; Code of Civil Procedure, Sections 1345^{1}–1345^{11}, as enacted in 1914). Shershenevich, 2 Textbook of Civil Law (in Russian 11th ed. 1914–1915) 289 *et seq.*; Nolde, *op. cit.*

[57] See *infra*, Chapter 4, I.

cept of divorce as the right of either spouse to sever the marital ties unilaterally without stating the reasons, was announced in 1918 and survived until July 8, 1944. The general trend of legislation of this period was directed against the family as a traditional institution. In the eyes of the law, not the marriage but factual origin created the relationship between parents and children. Their mutual obligation to provide maintenance and support was recognized only insofar as the parent or child was destitute and not able-bodied and the State did not take care of him.[58] No provision of law protected parental authority or made parents responsible for their children. (The subsequent development of the soviet legislation concerning domestic relations is discussed in Chapter 4, I.)

All military and civilian ranks, all decorations, orders, and similar distinctions were abolished.[59] The abolition of all racial and religious discrimination, enacted by the provisional government,[60] was restated. But along with economic leveling, discrimination according to former or present social standing was introduced by the Constitution. It was reflected in the right to vote, in distribution of food, in admission to schools, to the Party, and to office. Manual laborers and farm hands were given privileged treatment.[61]

The soviet State was conceived as an international State of toilers. An alien considered a worker was

[58] Code of Laws on Acts of Civil Status, Marriage, Domestic Relations, and Guardianship of 1918, R.S.F.S.R. Laws 1917–1918, text 818, Sections 133, 161 Note, 163; also Section 104.

[59] Decree of November 28, 1917, R.S.F.S.R. Laws 1917–1918, text 31.

[60] For the soviet declaration, see *id.*, text 18 (omitted in the second edition). For the presoviet act, see Laws of Provisional Government 1917, text 400.

[61] E.g., R.S.F.S.R. Laws 1917–1918, text 882; R.S.F.S.R. Constitution 1918, Sections 64–65.

granted the right to vote in the soviets, and conversely, a Russian national who belonged to an undesirable social stratum (e.g., a priest, a monk, or a person employing hired labor) was deprived of such right.[62] The name Russia was omitted in the official title of the soviet land —Union of Soviet Socialist Republics—introduced in 1922. There was no desire on the part of the government to preserve any connecting link with Russia's past, especially in the field of law, and the teaching of Russian history was omitted from the curriculum of Russian schools.[63]

Two major events marked the end of this period: the famine of 1921 and the rebellion of sailors in Kronstadt, hitherto ardent supporters of the soviet regime.

III. New Economic Policy (1922–1929)

1. General Characteristics

The New Economic Policy (N.E.P.), inaugurated in 1921, implied a concession to private initiative in business, to private property, and, in this way, to private rights. The confiscation of grain surpluses from peasants (*prodrazverstka*) was changed to a tax in kind on March 21, 1921,[64] and was later converted into a tax in money.[65] On May 24, 1921, free barter[66] was declared, and on March 28, free trade in grain, bread, and forage.[67] Small scale private industrial establishments employing not more than twenty workers were legalized

[62] R.S.F.S.R. Constitution 1918, Section 64 Note 2; *id.* 1925, Section 68 Note; Nationality Statute 1924, Section 6.

[63] See Chapter 4, II, 1.

[64] R.S.F.S.R. Laws 1921, text 147.

[65] *Id.* 1923, text 451. The tax has been payable only in money since January 1, 1924.

[66] *Id.* 1921, text 212.

[67] *Id.*, text 149. See also Decree of August 9, 1921, on implementation of the N.E.P., *id.*, text 403.

on May 17 of the same year.[68] Concessions, especially to foreigners, began to be granted as a matter of everyday policy, admitting private capital to such spheres as still remained the monoply of government.[69] But exceeding in importance all scattered provisions, a *magna carta* of property rights appeared. It was the Decree of May 22, 1922, whose title well conveys its message. It reads: "On Fundamental Private Property Rights Recognized by the Russian Soviet Republic, Secured by Its Law, and Protected by Its Courts."[70] This Decree was the embryo of the coming Civil Code and announced the basic principles of the latter. A partial denationalization took place; some properties (small houses and small industrial establishments) were returned to their former owners, and any new confiscations were prohibited for the future.[71] The government sought to give the country a "breathing spell" (as the slogan went) in order to allow private enterprise an opportunity to restore the economy, while the State kept the "commanding heights" in order to check the growth of private capital as soon as it might endanger the communist regime. Thus, Section 4 of the Civil Code, which took effect on January 1, 1923, emphasized that private rights

[68] *Id.*, texts 230, 240. See Chapter 8, IV, 2.

[69] The first decree on concessions, issued November 23, 1920, did not produce any results. In 1922, there were 338 offers (45 of them from the United States, of which 15 resulted in concessions in 1923); out of 60 concessions negotiated, 45 were concluded. Butkovsky, Foreign Concessions in the National Economy of the U.S.S.R. (in Russian 1928) 34. For the early law on concessions, see R.S.F.S.R. Laws 1922, text 320; *id.* 1923, texts 246 and 952; U.S.S.R. Laws 1927, text 694. Bernstein and others, Legal Conditions of Concession in the U.S.S.R. (in Russian 1931); *id.*, Concession Law (in Russian 1930). See also *infra* p. 364 note 27.

[70] R.S.F.S.R. Laws 1922, text 423. A similar decree was promulgated in the sister soviet republic—the Ukrainian Republic: Ukrainian Laws 1922, text 492. A comprehensive study in English of this decree is to be found in Freund, "Civil Law of the Soviet Union" (1928) 22 Ill. L. Rev. 710 *et seq.*

[71] See Chapter 8, IV.

(legal capacity) are given to citizens "for the purpose of developing productive forces" only.[72]

The main features of the new policy were characterized by Lenin as follows:

> (a) The land is retained by the State. (b) The same is true of the commanding heights in the province of means of production (transportation et cetera). . . . (c) Free trade in the sphere of small-scale industry. (d) State capitalism in the sense that private capital shall be admitted to economic activities (concessions and mixed corporations).[73]

Stalin depicted the same period in a very similar way:

> In the first period of the New Economic Policy, we admitted a resurrection of capitalism, private commerce (circulation of goods), the "activities" of private merchants, capitalists, speculators. It was more or less free trade, limited only by the regulative activity of the State. The private sector occupied an important place in the traffic of commodities.[74]

As a whole, soviet law represented for a time (to use the words of a soviet jurist) "a combination of elements fundamentally opposed to each other but, nevertheless, coexisting of necessity."[75] These elements were socialism versus capitalism in economy, the rejection of private property rights versus their admission in law. A rather flexible line of demarcation, lacking precision, was drawn between these two elements. Certain fields were reserved for state monopoly: land, transportation, banking, insurance, foreign trade, and large-scale indus-

[72] For the fate of this clause, see Chapter 9.

[73] Lenin, 27 Collected Works (Russian 2nd edition 1929–1932, identical with 3rd ed.) 338; also 26 *id.* 340.

[74] Stalin's Speech, Pravda, January 10, 1933. See also his other definition *supra*, note 7.

[75] Ilyinsky (Bruk), Introduction to the Soviet Law (in Russian 1926) 55; see also Kantorovich, The Legal Basis of the Economic Order of the U.S.S.R. (in Russian 1925) 11; Malitsky 22, 23, quoted in Chapter 6, at note 76.

try. But within these, licenses, especially to foreign capital, were permitted and granted. Other fields were left to private business: domestic commerce and small-scale industry. But in these areas, government enterprises sought to compete with private undertaking.

An era of extensive legislation was inaugurated with the advent of the New Economic Policy; private law, civil procedure, criminal law and criminal procedure, labor law, domestic relations, and land tenure were subjected to regulation within a short period by comprehensive statutes called codes. Separate statutes were enacted to regulate negotiable instruments, patents, and copyrights.

The rather indefinite and loose relations between individual soviet states as they were formed within the territory of Russia were settled in December 1922, by the adoption of a federal Constitution of the Union of the Soviet Socialist Republics (U.S.S.R.). The story of its formation is discussed in Chapter 2, and the interrelation between federal and state legislation in the field of private law in Volume II, No. 1, comment to Section 1 of the Enacting Law.

2. General Characteristics of the Civil Code of 1922

The Civil Code of the R.S.F.S.R., prepared in the record time of four months, was designed to be "the economic policy of the transitional period laid out in the form of sections of a statute," as defined by Stuchka, the Chief Justice of that period.[76] The appearance of the Code indicates that it was framed after the pattern of the most advanced Western European codes, the German and the Swiss. It is subdivided into four parts: a general part dealing with such topics as legal capacity,

[76] Stuchka, 1 Course 9.

persons, corporations, legal transactions, and the statute of limitations; a part called "Rights in Rem," treating property, ownership, mortgage, and building tenancy; a part devoted to obligations (contracts and torts); and finally, a part dealing with inheritance. A separate law enacting the Code contains transitory provisions in nine sections.

Many of the provisions of the Code were taken from the draft of a civil code which had been prepared under the imperial regime and introduced in the Russian legislature, the State Duma, in 1913, but not passed. A part of this code containing some 1,500 sections was reduced to 431. The principal compiler of the code was Goikhbarg, a young lawyer and writer on legal matters under the imperial regime.

As compared with other European codifications, the soviet Code left certain fields usually covered in the civil code unprovided for, viz., domestic relations, real property (land tenure), and master and servant. A separate code was enacted for each of these topics. In presoviet Russian, as in modern Anglo-American law, civil and commercial law are amalgamated and do not form two separate systems, as is the case in Germany, Spain, Italy (prior to 1942), and certain other European countries. The soviet Civil Code followed the imperial Russian tradition. Some of the topics of commercial law, such as corporations, agency, and insurance, are covered by the Civil Code. Other topics, e.g., negotiable instruments, patents, and copyrights, though regulated by separate laws, are nevertheless regarded as component parts of a single system of private or civil law.

The dual nature of the New Economic Policy under which the soviet Civil Code was prepared is reflected in

the nature of the provisions of the Code. Some of these provisions might easily have been included in the civil code of any capitalist civil law country. Such provisions predominate, and, as a rule, they have not been commented upon in the present edition. It has been felt that they may be understood without explanation. The author is of the opinion that, although certain clauses in this category are inferior to those of the draft prepared before the Revolution, they are for the most part superior to the insufficient and in part antiquated provisions of Volume X of the imperial General Code of Laws (*Svod Zakonov*), which regulated the fields of law in question. However, a series of sections was inserted in the Code to represent the socialistic elements of soviet law. These sections have been extensively commented upon in the present edition. The details are to be found in subsequent chapters of Volume I, and in the comments upon individual sections in Volume II, but a brief general outline is offered here.

All continuity of rights and of law effective prior to the Revolution of November, 1917, is flatly denied by the Civil Code. Prerevolutionary rights were automatically cancelled, being deprived of protection by the new courts.[77] The abrogation of former property rights was especially stressed in Section 59 Note 2. Thus, with the advent of the Civil Code in 1923, the former private rights were not, as a rule, restored; actual dispossessions that had taken place were legalized, but future dispossessions were forbidden, and the possibility of acquiring new rights was admitted. Private property thereafter acquired was recognized and protected. But private property was assigned a limited sphere by the

[77] See Chapter 8 and Sections 2, 6, of the Enacting Law.

exemption of certain things from private ownership and their reservation to the exclusive ownership of the State (large plants and factories) and the withdrawal of others from commerce (land).[78] Further limitation was effected by means of taxation. An individual trade tax, an individual agricultural tax, and a special leveling tax were established, to be assessed by the tax authorities in arbitrary amounts beyond the regular scale imposed upon taxpayers earning in excess of a stated amount.[79] Certain activities remained under governmental monopoly, e.g., foreign trade,[80] banking, and insurance.[81]

In contrast to these restrictions, domestic commerce was for a time open to private persons. Section 5 of the Civil Code provided a *magna carta* of private rights; their original scope and subsequent limitation are discussed at length in Chapter 9, II. Rights of succession, though in limited form, were re-established by the Civil Code, and some of these limitations were gradually removed.[82] Copyrights and patents were also revived.

Even in those spheres from which private ownership was excluded, as, for instance, land or large-scale industry, something resembling private property was recognized by the Civil Code and the Land Code of 1922. For example, by means of concession or lease, a private person might run a large-scale industrial enterprise[83]

[78] Civil Code, Sections 21 to 24, 53, 54, 56. See also Chapter 9, II, and Chapter 16.

[79] Statute on Agricultural Tax of March 29, 1931, Section 79; U.S.S.R. Laws 1931, texts 6 and 171. Statute on Trade Tax from Private Business, U.S.S.R. Laws 1930, text 481; *id.* 1931, text 279; *id.* 1932, text 459. Income Tax, *id.* 1930, text 482.

[80] Civil Code, Section 17.

[81] The governmental monopoly established earlier (see *supra,* note 23) was not abolished.

[82] See Chapter 17.

[83] Civil Code, Sections 55, 56, 153. See *supra,* note 69.

or might hold real property in cities under "building tenancy" for a term of not more than sixty years for the purpose of constructing dwellings,[84] or in the form of "toil tenure" of agricultural land unlimited by any period of time under the Land Code.[85]

However, there was another side to the coin. The newly acquired private rights were precarious in nature; they were conceived as having been lent rather than granted; a conditional protection of rights was promised. This was made clear by the following instruction of Lenin to the compilers of the Civil Code:

> We do not recognize anything "private"; for us, everything pertaining to the economy is a matter of public and not private law. The only capitalism we admit is State capitalism. . . . Hence, we must enlarge the interference of the State with the relations pertaining to "private law," enlarge the right of the government to annul, if necessary, "private contracts" and to apply to private law relations, not the *corpus juris romani* [!], but our revolutionary concept of law.[86]

Section 1 of the Civil Code was intended to be such a "Damocles' sword" over private rights. Interpretation of its clauses by soviet and nonsoviet theorists and its application by the soviet courts are discussed at length in Chapter 9, I. A watchtower over private transactions between private persons was erected by the provision of Section 30 of the Civil Code, that transactions which are legal in themselves and have legal purposes are, nevertheless, null and void if "directed to the obvious prejudice of the State." Whatever is delivered by one party to another in performance of such void transactions reverts to the State (Section 147).[87]

[84] *Id.*, Section 71 *et seq.* See also Chapter 16, II.
[85] Land Code of 1922, R.S.F.S.R. Laws, text 901, Sections 11, 12. For translation, see Volume II. See also Chapter 19, II.
[86] Lenin, 29 Collected Works (2d Russian ed.) 419.
[87] See Chapters 12 and 13.

A voluminous category of contracts must be notarized to be effective, particularly if a government enterprise is a party to the contract.[88] Notaries public are outright government officials in Soviet Russia, keeping a permanent record of acts notarized. Therefore, this rule enables the government to supervise private transactions. Many other contracts must be made in writing.[89] The terms of contracts, which in other countries are ordinarily left to the determination of the parties, are in many instances subject to mandatory regulation, namely in cases where a government enterprise is a party to the contract.[90]

The government attorneys have been granted the power to interfere with private litigation and to enter any civil case at any stage of the proceedings.[91]

Along with the elements of private business and freedom of contract in the economy, new methods of conducting business by government enterprises made their appearance. The initial steps were taken to build up governmental business agencies after the pattern of private corporations, the so-called trusts and *torgs*. Since some of the basic principles governing these organizations are still effective, these are discussed at length in the next chapter and in Chapter 11, Corporations and Other Legal Entities in Soviet Law. A translation of pertinent legislation is given in Volume II, Nos. 12–17.

3. Some Special Privileges of the State

A number of privileges were given to the State, and

[88] Civil Code, Sections 137, 153. For an enumeration of contracts requiring notarization, see comment to Section 27.

[89] For their enumeration, see comments to Sections 27 and 29.

[90] E.g., Sections 162–164, 179 Notes. See also Chapters 12 and 13.

[91] Section 2, Code of Civil Procedure. See also Chapter 23, Courts and Civil Procedure.

its interests were accorded special protection. As has been mentioned elsewhere, the State retained a monopoly of ownership of all land (Section 21), large industrial establishments and certain other properties (Sections 22, 23), foreign trade (Section 17), banking, transportation, and insurance. In addition, some specific provisions were designed to provide special protection for State interests. An extensive interpretation of the provisions of the Civil Code and other statutes is permitted only if required by the interests of the State.[92] The State may recover from a bona fide holder any of its property illegally alienated in any manner whatsoever (Section 60). Favorable conditions for obtaining property through escheat existed until 1945 and still exist to an extent.[93]

Ownerless property, except property of an extinct peasant family household, belongs to the State (Section 68). The R.S.F.S.R. Supreme Court has interpreted this provision as constituting a presumption of government ownership of any property within the confines of the U.S.S.R. until the contrary is proved.[94] A find whose owner does not appear and any treasure-trove belong to the State, and the finder is entitled only to remuneration (Section 68*a et seq.*). The claims of the State for recovery of property from an unlawful possessor, especially on the ground of invalid contracts (Sections 30, 185), are not subject to the statute of limitations.[95]

[92] Enacting Law, Section 5. See Chapter 6, II, 2.
[93] For details, see Chapter 17, Inheritance Law.
[94] R.S.F.S.R. Supreme Court, Plenary Session, June 29, 1925, Civil Code (1941) 148. In the 1943 edition of the Code, this part of the ruling was omitted from the quotation on p. 152, and the recent soviet writers consider it obsolete. See Chapter 16, III, on Property.
[95] R.S.F.S.R. Supreme Court, Plenary Session, Resolution of June 29,

The government may dissolve any legal entity (corporation) if its activities "deviate in a direction contrary to the interests of the State" (Section 18). A transaction legal in itself shall be null and void if "it tends toward obvious prejudice of the interests of the State" (Section 30). Whatever one party obtains from the other party by means of such transaction shall not be restored to the latter but forfeited to the State (Section 147). Any illicit enrichment is also reverted to the State (Section 402), in particular when it has been obtained through a transaction entered into under duress (Section 149) or in a state of necessity (Section 150).

If a government industrial unit is rented to a private person, the tenant is required to keep production at a certain level (Section 162) and to insure the enterprise at his expense (Section 164), and he has no right to sublet it without a written permit (Section 168 Note). Capital repair of rented property is, as a rule, the responsibility of the owner (Section 159), but if government property is leased, it is the responsibility of the tenant unless otherwise stipulated in the contract (Section 159 Note). Although the general rule is that the tenant or other lessee is authorized either to receive compensation for improvements on leased property or to carry them away if separable (Section 179), all such improvements made on property leased from the government belong to the State without compensation (Section 179 Note).

4. Protection of the Poor

Protection of the "toiling masses" is explicitly mentioned in one place; extensive interpretation of the Civil

1925, Civil Code (1943) 152. For translation, see Vol. II, Civil Code, Sec. 44, comment.

Code and the statutes is permitted only "if it is required in the interests of the State and the toiling masses."[96] If a party in distress enters into a legal transaction which is plainly unprofitable to him, such transaction may be invalidated on complaint of the aggrieved party and, prior to 1938, on the complaint of a competent government authority.[97] In view of the economic status of the debtor, the court may defer payment or order payment in installments.[98] When passing a decision on a claim for damages caused by injury, the court, in view of the economic status of the litigants, may impose the payment upon a person not liable (Section 406). In any event, in determining the amount of damages, the court takes into account the economic status of both parties (Section 411).[99]

5. Land Tenure

In the field of land tenure, no restoration of landed property rights took place. The government remained the sole owner of the land, and the principle of toil tenure was reaffirmed. The factual possession which appeared as a result of redistributions by the peasants themselves was stabilized as of May 22, 1922. Any further redistribution of land between villages was prohibited. The new Land Code of October 22, 1922,[100] allowed free choice to villages and, under certain circumstances, to individual peasant households to select any form of land tenure from among those existing before the Revolution, such as village commune or individual family tenure, or from the new collectivist forms recommended

[96] Enacting Law, Section 5. See Chapter 6, II, 2.
[97] Civil Code, Section 33.
[98] *Id.*, Section 123.
[99] For discussion of application of this section, see Chapter 15.
[100] The legislation of this period regarding farming is discussed at length in Chapters 18 and 19, where all references are given.

by the government, viz., agricultural communes or collective farms of various types. The private toil tenants, villages, or peasant families were promised, instead of ownership, the right "of direct toiling use of the land," which was declared to be "without a time limit." Buildings erected on the land, implements and other accessories, crops and other products were declared to be the absolute private property of the holder of the land. At the same time, the right to use the land was not accompanied by the power to transfer it by any private transaction, such as sale, barter, mortgage, donation, bequest; leasing was restricted and eventually abolished. Independent individualistic farming of the small-scale peasant family type tended to grow and expand under the New Economic Policy. These small farmers with some degree of prosperity and no sympathy for collectivism in farming were later branded as kulaki (meaning "fists" in Russian), and they became the target of soviet legislation designed since 1929 to collectivize farming in Russia.

6. Courts

Finally, under the New Economic Policy, the courts were definitely established, courts which, in spite of numerous deviations from Western European standards, had to be guided from then on by rules of written law, codes of criminal and civil procedure and other codes. There was thus a voluminous body of substantive and adjective law which had to be handled and applied in some way. As the codes were enacted after a period of almost complete denial of private rights, their individualistic provisions were novelties. A revival of the teaching of law and of legal studies and a

quest for legal socialist doctrine marked the advent of the New Economic Policy. Soviet legal literature actually was born during this period (see *infra*, Chapters 5 and 6).

7. Summary

In summarizing the general situation created by the New Economic Policy, it may be stated that Soviet Russia had arrived at a crossroads where socialism and resurrected capitalism met. Such was the general opinion of foreign observers, and this same dilemma became a vital subject of discussion and disagreement within the ranks of the ruling members of the Communist Party. About 1929, a decision was made; the general Party line was turned towards socialism through industrialization and collectivization of farming. This was the true meaning of the Five-Year Plan then put into operation.

IV. Transition Under the First Five-Year Plan (1929–1934)

The industrialization of Russia was not the real objective of the Five-Year Plan, but a means to an end. Its primary purpose was the enforcement of socialism. Upon the completion of the Plan in 1933, Stalin stated plainly that it had been framed and carried out in order:

> To create such industry in our country as should be able to re-equip and reorganize, not only the whole of industry, but also transportation and agriculture—on the basis of socialism.[101]

According to Stalin, the objective of the Plan was to convert the U.S.S.R. into an industrial country, to eliminate fully the capitalist elements, to widen the front

[101] Stalin, Problems of Leninism (English ed. Moscow 1940) 409.

of socialist economy, and to create an economic basis for the abolition of classes in the U.S.S.R., for the construction of a socialist society.[102]

There was also another aspect of the Plan which did not appear of importance at the time the statement was made in 1933, but which now gives a partial explanation of the miracle of Russian success against the German aggression. The Five-Year Plan aimed also:

> To create within the country the necessary technical and economic prerequisites for increasing to the utmost the defensive capacity of the country, to enable it to organize determined resistance to any and every attempt at military intervention from outside, to any and every attempt at military attack from without.[103]

Again the Second Five-Year Plan (from 1933 on) was also designed with the aim "of complete abolition of the capitalist elements and the classes in general."[104] Thus, the Plans sought to bar private business from commerce and industry and to replace the independent farming of individual peasant households or their communities, hitherto recognized by the Land Code, with collective farming controlled by the government. The Plans were directed against the private rights granted by the entire legislation of the previous period. Numerous laws and decrees were enacted, sometimes directly repealing, but often simply neglecting, the provisions protecting private rights. Such provisions, and those of the Civil Code in particular, have become inoperative, although they remain on the statute books. For example, Stalin advocated on April 6, 1929, that:

102 *Ibid.*

103 *Ibid.*

104 Resolution of the XVI Conference of the Communist Party, quoted from Resunov, The Soviet State and the Socialist Society (in Russian 1934) 5.

> Provisional extraordinary measures are permissible . . . as one of the methods of breaking up the resistance of the kulaki [independent peasants] and taking away from them the maximum of their surplus food.

In discussing the apparent conflict between the existing law coming from the New Economic Policy period and the new line of policy in 1930, he suggested that:

> Consequently, all such laws should be laid aside in the regions assigned for integral collectivization. . . . In order to eliminate the kulaki as a class, it is necessary . . . to deprive them of the productive sources of their existence and progress (of the free use of land, of the instruments of production, of the right to rent the land and hire labor, and the like).[105]

Private tradesmen (so-called nepmen) and the more or less prosperous independent farmers (kulaki) were eliminated as a result of administrative measures and new laws.[106] The sphere of private ownership was considerably curtailed, as compared with the period of the New Economic Policy. In 1936, a new federal Constitution was adopted, which, in contrast to the previous federal Constitution, not only provided for a scheme of political authorities, but also outlined the new social order. This Constitution, with some amendments, is still in force. Under its provisions and the subsequent legislation the soviet political, social, and legal order acquired new features distinct from both the New Economic Policy and Militant Communism. These are discussed in the following chapters.

[105] Stalin, Problems of Leninism (Russian 10th ed. 1935) 267, 320.

[106] As an example of the broad powers granted to the local administrative authorities pursuant to the new policy, reference may be made to the Law of February 1, 1930 (U.S.S.R. Laws, text 105, Section 2), which authorized the provincial administration, in regions assigned for collectivization, to confiscate all property, including personal belongings, of those families whom the local soviets considered kulaki, and to order their deportation. Their properties were to be turned over to the collective farms as the share of the poorest peasants joining the collective farms.

Chapter 2

Present Stage: Political Organization

I. Development of the Union

In comparison with the other federations of the world, the United States, the Swiss Federation, and others, the Soviet Union shows distinct features of its own. The Soviet Union (the Union of the Soviet Socialist Republics—U.S.S.R.) is now organized as a federation of *sixteen* states, the soviet constituent republics.[1] *Four* of these, the R.S.F.S.R. (Russian Socialist Federated Soviet Republic), Uzbekistan, Azerbaijan, and Georgia, embrace *sixteen* political entities or so-called republics, but in contrast to the constituent republics, the immediate members of the Union, these are called autonomous republics.[2] Autonomous republics are, so to speak, sub-

[1] U.S.S.R. Constitution, Section 13; the Russian Soviet Federated Socialist Republic, the Ukrainian Soviet Socialist Republic, the Byelorussian (White Russian) Soviet Socialist Republic, the Georgian Soviet Socialist Republic, the Azerbaijan Soviet Socialist Republic, the Armenian Soviet Socialist Republic, the Turkoman Soviet Socialist Republic, the Uzbek Soviet Socialist Republic, the Tadjik Soviet Socialist Republic, the Kazakh Soviet Socialist Republic, the Kirghiz Soviet Socialist Republic, the Karelo-Finnish Soviet Socialist Republic, the Moldavian Soviet Socialist Republic, the Lithuanian Soviet Socialist Republic, the Latvian Soviet Socialist Republic, the Estonian Soviet Socialist Republic.

Some information given in this chapter has appeared in the author's digest of the U.S.S.R. Laws in the Lawyers Directory, (Cincinnati 1947) 2040, *et seq.*

[2] The R.S.F.S.R. embraced twelve in July, 1947: the Tatar, Bashkir, Daghestan, Buryat-Mongolian, Kabardino-Balkar, Komi, Mari, Mordovian, North Ossetian, Udmurt, Chuvash, and Yakut Autonomous Republics (1936 Constitution, Section 22). The German Volga Republic was dissolved on September 24, 1941. A decree on the dissolution of the Crimean and Chechen-Ingush Republics listed in the Constitution was first made public on

states within these states. The number of the republics, both constituent and autonomous, has varied in different periods of the soviet regime.

There are also substates of somewhat inferior rank, the so-called autonomous regions. Their number has also varied; at the present time there are *six* in the R.S.F.S.R. and *one* each in the Azerbaijan, Georgian and Tadjik republics. Their status is discussed *infra*, IV, 3.

1. Soviet Polity Before 1923 (R.S.F.S.R.)

The Russian Soviet Federated Socialist Republic (R.S.F.S.R.) is the first established and the largest of the soviet states. It includes Great Russia (Central and Northern Russia), the Crimea, the Northern Caucasus, Siberia, and the Far East, or 92.8% of the area of the Soviet Union, and some 68% of its population (within the boundaries as of January 1, 1939).

The word soviet used in the official name of the Republic may be explained here. The Russian word

June 25, 1946 (Izvestiia June 26, 1946). However, these republics, as well as Kalmyk and Karachay, do not appear in the list promulgated in October, 1945, in connection with the February, 1946 election (Vedomosti 1945, No. 73). Kalmyk, Karachay and Checheno-Ingush Republics were not listed in the budget approved on June 8, 1945 (Vedomosti June 20, 1945, No. 35, supplement 1). These areas were deprived of the status of republics and became ordinary regions after their territory was liberated from the Germans as a penalty for disloyalty, and Chechens and Crimean Tatars were banished to other parts of the Soviet Union, Izvestiia June 28, 1946. Section 22 of the Constitution was amended accordingly on February 25, 1947. (Vedomosti 1947, No. 8.)

The Azerbaijan S.S.R. includes one, the Nakhichevan (Armenian) Autonomous Republic (*id.*, Section 24).

The Georgian S.S.R. includes two, the Abhaaz and Adjar Autonomous Republics (*id.*, Section 25).

The Uzbek S.S.R. includes one, the Kara-Kalpak Autonomous Republic.

The autonomous regions as of February 25, 1947, were as follows: Adygey, Circassian, Jewish, Oirot, Tuna-Tuva and Khakass in the R.S.F.S.R.; South Ossetian in the Georgian Republic; Nagorno-Karabakh in the Azerbaijan; Gorno-Bagdakhshan in the Tadjik Republic.

"soviet" ("sovet" according to the new spelling) did not have any definite political connotation prior to 1917. It meant council, counsel, and advice; in the meaning of council it was used in the names of many Russian imperial government bodies, e.g., *Soviet Ministrov*—the cabinet, *Gosudarstvennyi Soviet* (State Council)—the upper chamber of the Russian legislature.

After the collapse of the imperial government in March, 1917, there was a possibility for two self-constituted organizations to assume authority as a revolutionary government. The leaders of the opposition in the State Duma (the lower house of the legislature) formed a Provisional Committee of the State Duma consisting of representatives of liberal nonsocialist parties. But the leaders of the socialist parties (mensheviks, bolsheviks, and socialist revolutionaries) who were present in Petrograd (later renamed Leningrad) formed a committee and convoked an assembly of representatives of workers from Petrograd factories and of soldiers of the military units which joined the revolution. The assembly was given the name of Soviet (meaning Council) of Workers' and Soldiers' Deputies, following the example of the Soviet (Council) of Workers' Deputies which, in 1905, with Trotsky as deputy chairman, had sought to lead the abortive revolution and had been disbanded by the imperial government. The committee of representatives of the socialist parties, somewhat enlarged by the members elected by the Soviet, was declared to be the Executive Committee of the Soviet. Similar organizations appeared in other cities, at the front, and in the rural districts, and assumed the names of Soviets of Workers' and Soldiers' and/or Peasants' Deputies, as the case might be. Many

members were appointed by leftist leaders and not elected; soviets did not represent citizens at large.

The so-called Provisional Government was formed by a compromise of the Duma's Committee with the Petrograd Soviet leaders. Kerensky, vice-chairman of the Soviet, joined the cabinet as the Minister of Justice. The Grand Duke Michael, in whose favor Nicholas II abdicated, conditioned his consent on the vote of a Constituent Assembly to be convoked. He vested full power in the Provisional Government until the Assembly convened, making it the legitimate government of Russia. Though the "soviet" leaders consented to the formation of the Provisional Government, they declared a conditional recognition of its authority, "insofar as" it would further the revolution. The Petrograd Soviet interfered with the authority of the Provisional Government and the local soviets with the agencies appointed by that government, or those elected later by general suffrage.

Under the pressure from the left, the membership of the Provisional Government underwent several changes. Representatives of the menshevik and socialist revolutionary socialist parties, who for a time controlled the Soviet, were gradually taken into the government, replacing moderate liberals who resigned. Kerensky became prime minister ultimately. Against this method of realizing a more radical policy by joining the cabinet and making use of the existing government machinery, the bolsheviks put forward, at the instance of Lenin, the slogan "All power to the Soviets." He called for the assumption of direct government power by the soviets, and for the rejection of the entire governmental machinery then in existence.

The first nationwide Congress of Soviets, which con-

vened in June, 1917, was not controlled by the bolsheviks and made no attempt to deprive the Provisional Government of its authority. The seizure of power by the bolshevik party in October/November, 1917, was timed with the convention of the Second Congress of Soviets in Petrograd. The revolutionary government, formed then by the central committee of the bolshevik party, took the name of Council (Soviet) of People's Commissars and succeeded in getting the approval of the *coup d'etat* by the Congress, after the opposition left the Congress (*infra,* note 40). The Council of the People's Commissars was declared to be responsible before the Executive Committee of the Congress of Soviets and the Congress itself. All three institutions were declared the bearers of the central governmental authority, and the local soviets, of the local authority. The Council of People's Commissars declared in its first act that it assumed power temporarily until the convocation of the Constituent Assembly. However, when it convened in January, 1918, and, controlled by the socialist revolutionaries, refused to recognize the *coup d'etat,* the Assembly was disbanded by the bolshevik government. The provisional scheme of the new government authorities became definitely established as the "soviet" regime. Since then the word soviet connotes, in Russian and other languages, the regime which came into being in Russia as a result of the seizure of power by the bolshevik party, which later changed its official name to the Communist (bolshevik) Party.

The first R.S.F.S.R. Constitution was promulgated in July, 1918, in order to provide a new soviet federated organization for the entire territory of imperial Rus-

sia[3] and to organize the racial minorities of Russia into autonomous republics within the R.S.F.S.R. However, the civil war which soon broke out, the secession of Finland, Lithuania, Latvia, Estonia, and the Polish provinces, the annexation of Bessarabia by Rumania, as well as the existence of anti-soviet Russian nationalist and separatist armies, reduced the area actually controlled by the R.S.F.S.R. to the central provinces of European Russia. When the soviet regime was gradually extended (1920–1921), certain of the territories held before by anti-soviet armies were incorporated into the R.S.F.S.R. as regions or as autonomous republics (the Crimea, some parts of Siberia). In other parts where during the civil war independent republics had sprung up, each covering an area with one predominant ethnological group, soviet socialist republics were created and called by the name of such group. Thus, the Ukrainian S.S.R. derives its name from the Ukrainian or Little Russian branch of the Russian nation, and the Byelorussian (White Russian) S.S.R. from its Byelorussian (White Russian) branch.[4] In the Transcaucasus, in 1920–1921,

[3] The adjective used in its name, *Rossiiskaia* (of Russia), is derived from the name of the country, *Rossia*, and not from the designation of Russian nationality, the adjective for which (in Russian) is *Russkaia*.

[4] The English term "White Russian" is ambiguous, being used to translate two different Russian terms, one ethnological, the other political. Ethnologically and linguistically, the Russians are subdivided into three branches: one group are called Great Russians (*Velikorossy*, inhabitants of Central Russia, approximately seventy million), another are called Ukrainians or Little Russians (*Malorossy*, inhabitants of Southwestern Russia, Galicia, Northern Bukovina, and the sub-Carpathian regions of Czechoslovakia, also called Ruthenians, approximately thirty-five million), and the third and smallest group, about six million who live in Northwestern Russia, are called in Russian *Byelorussy* (noun) or *Byelorussky* (adjective), which mean in English "White Russian." However, the English terms "White Russian" and "White Russia" are used not only to denote this ethnological group of Russians and the area inhabited by them but also the political opponents of the soviets, for whom the Russian term is *Byely* meaning simply "white," like our English "Red." To avoid confusion, the soviets have recently begun to use officially in English "Byelorussian Republic" or

the thus-far independent Georgian, Armenian, and Azerbaijan (Baku) republics were transformed into soviet socialist republics.

These soviet republics, from their inception, concluded treaties with the R.S.F.S.R., submitting to its authority major fields of government and administration, such as war, finance, national economy, and transportation.[5] These republics were represented in the supreme governmental bodies of the R.S.F.S.R. The soviet land was then like a confederation, and the government of the R.S.F.S.R. exercised to an extent the functions of a confederate government.

2. Formation of the U.S.S.R., 1923

But on December 30, 1922, the Soviet Union, the Union of Soviet Socialist Republics (U.S.S.R.), was officially formed as a federation of all the above-mentioned republics. Thus, the federal, the U.S.S.R. government, became distinct from that of the R.S.F.S.R., which since 1923 has been merely one of the states of the Soviet Union.[6]

"Byelorussia" instead of the term previously in common use, "White Russian."

[5] Decree of the Russian Central Executive Committee of June 1, 1919, declaring a union of the Russian, Ukrainian, Latvian, Lithuanian, and White Russian Soviet republics to combat imperialism. See Kotliarevsky, The U.S.S.R. (in Russian 1925, 2d ed. 1926) 4. A treaty with the Ukraine was concluded on December 28, 1920, with Byelorussia on January 16, 1921, with Azerbaijan on September 30, 1920, and May 24, 1922, with Armenia on December 2, 1920, and September 20, 1921, and with Georgia on May 7, 1920, and May 21, 1921. For an English translation of some of these treaties, see Batsell, The Soviet Rule in Russia (1929).

[6] Laws and decrees which were enacted by the R.S.F.S.R. Central Executive Committee and its Presidium prior to the formation of the Union but which also took effect in other soviet republics were declared effective throughout the territory of the Soviet Union by the U.S.S.R. Central Committee on July 13, 1923. See (1923) Vestnik No. 1, text 12.

The Constitution of the U.S.S.R. was adopted on July 6, 1923. Vestnik No. 2, text 46.

The Georgian, Armenian, and Azerbaijan republics entered into the Union as a single federation called the Transcaucasian Soviet Federated Republic. This intermediary link, the Transcaucasian Republic, was abolished by the 1936 federal Constitution.

The Uzbek, Turcoman, Tadjik, and Kirghiz soviet republics, as well as the greater part of the Kazak Republic, are situated in Central Asia. Except for a part of the Kazak Republic, they were formed from the territory of Russian Turkestan and of the semi-vassals of imperial Russia, the Khanate of Khiva (Kwarezm) and the Emirate of Bokhara. The soviet regime was established in Russian Turkestan in 1921, and a Turkestan Autonomous Republic was formed and incorporated into the R.S.F.S.R. subject to all laws of the latter. About this time, the traditional rulers of Kwarezm and Bokhara were overthrown, and the "people's republics" of Bokhara and of Kwarezm were established. The soviet scheme of authorities was followed, but wide concessions to private property and Mohammedanism were retained, and these republics were not made constituent republics of the Soviet Union. An anti-soviet, so-called Basmach, rebellion soon broke out, and, in the course of its suppression, the entire area of Turkestan, Bokhara, and Kwarezm, together with the adjacent Russian territory, was subdivided into new political entities disregarding the historical divisions. The new divisions were given the names of the principal races of the area, Uzbek, Tadjik, Turcoman, Kazak[7] and Kirghiz.

The Uzbek Soviet Republic, as a constituent republic

[7] Kazak or Kazakh is the name of a Turkic tribe akin to the Kirghiz, not to be confused with the Cossacks, old-time frontiermen who are predominantly Russian.

of the Union, was formed toward the end of 1924. It included the autonomous Tadjik Republic which in December, 1929, was made a soviet constituent republic. The Turcoman Republic, as a soviet constituent republic, was formed in February, 1925. The Kazak and Kirghiz Republics were originally included, as autonomous republics, in the R.S.F.S.R., but the 1936 federal Constitution gave them the status of soviet constituent republics. The R.S.F.S.R. laws, including codes, continued to remain in force in these republics.

3. Expansion in 1939–1941

In the course of 1939 and 1940, the Soviet Union occupied several former Russian and some Austrian provinces, which between World Wars I and II had been parts of Poland, Finland, and Rumania, or had formed the independent states of Lithuania, Latvia, and Estonia. When the incorporation of these areas in the Soviet Union was declared in 1939 and 1940, they either were included in existing soviet republics or formed new constituent republics of the Soviet Union. Further expansion of the territory of the Soviet Union has occurred since the termination of World War II, but no new soviet constituent republics have been created, and for some of these territories no official act of incorporation has yet been made public. The following data may be gathered from official soviet publications.

Territory taken from Poland in 1939 has been included either in the Ukrainian or Byelorussian Soviet Republics. Former imperial Russian provinces traditionally considered Byelorusso-Lithuanian were incorporated into the Byelorussian Soviet Republic, and those considered Lithuanian (the Vilno region) were given

to the Lithuanian Soviet Republic (see *infra*). Galicia, which belonged before World War I to Austria, and former Russian provinces considered Ukrainian were included in the Ukrainian Soviet Republic.[8] In brief, the redistribution was effected in accordance with the assumed predominance of a certain ethnological group among the population. In the case of the Byelorussian and Ukrainian provinces, incorporation was preceded by people's assemblies, which convened on October 27–28 in Lwow, for the "Western" Ukrainian provinces, and on October 29–30 in Bialostok, for the "Western" Byelorussian provinces. These voted to join the Soviet Union and in favor of the nationalization of land, banks, railways, water transportation, telephone, telegraph, radio, and large industrial establishments.[9]

Northern Bukovina, which was taken from Rumania and belonged before World War I to Austria, was also included on August 2, 1940, in the Ukrainian Soviet Republic.[10] But Bessarabia, a former imperial Russian possession, when retaken from Rumania, was fused in August, 1940, with the Moldavian Republic, hitherto an autonomous republic within the Ukraine. The enlarged Moldavian Republic was made a constituent republic of the Soviet Union,[11] and all the major codes of the Ukrainian Republic, including the Civil Code, were introduced therein by an edict of the federal Presidium in December, 1940.[12] Prior to this, on August 15, 1940, the nationalization of land was declared by the federal Presidium in Northern Bukovina; the effect of the old

[8] Edicts of November 1 and 2, 1939, Vedomosti 1939, No. 36. For the frontier, see *id.* 1940, No. 45.
[9] Pravda and Izvestiia, October 30, November 1, 1939.
[10] Vedomosti 1940, No. 28.
[11] *Ibid.*, also No. 45.
[12] *Id.* No. 51.

soviet Decree of February 19, 1918, abolishing private ownership of land, was restored in Bessarabia; and, in both areas, the nationalization of banks, railroads, transport, and large industrial establishments was decreed.[13] So-called Ruthenia, or sub-Carpathian Russia, which between the two wars was a part of Czechoslovakia, was ceded by it to the Soviet Union under the Treaty of June 29, 1945,[14] and included as the Transcarpathian region in the Ukrainian Soviet Republic. No federal act has been passed up to July 1, 1947, defining the laws in force there.

Lithuania, Latvia, and Estonia were declared constituent republics of the Soviet Union on August 3, 5, and 6, 1940, respectively,[15] and the R.S.F.S.R. codes, viz., Civil Code, Criminal Code, Code of Civil Procedure, Code of Criminal Procedure, Labor Code, and Code of Laws on Marriage, Family and Guardianship, were enacted by the Edict of the federal Presidium of November 6, 1940.[16] Certain small parts of Estonia and Latvia were transferred to the R.S.F.S.R.[17] In the edicts enacting the soviet codes in the new territories, it was stated that all property disputes involving civil and other relations, regardless of the time when they

13 *Id.* No. 29.

14 The ratification of the treaty was printed without the treaty itself in Vedomosti 1945, No. 79, also *id.* 1946, No. 2.

15 Vedomosti 1940, No. 28. For a survey of their constitution in comparison with that of the U.S.S.R., see I. Trainin, "Constitutions of the New Soviet Republics" (1940) Soviet State No. 11, 11.

16 Vedomosti 1940, No. 46.

17 Shabad, "Recent Changes in the Political Geography of the Soviet Union," (1946) 7 American Review of the Soviet Union No. 2, 32; *id.*, "Political-Administrative Divisions of the U.S.S.R.," 1945 (1946) 36 Geographical Review No. 2, 309. These articles give the latest administrative subdivisions of the Soviet Union.

arose, should be decided "under the soviet codes and decrees of the soviet government." [18]

4. Expansion After World War II

The area retaken by Soviet Russia from Finland before the end of World War II was fused on March 31, 1940, with the Karelian Autonomous Republic of the R.S.F.S.R., and the enlarged Karelian Republic was made a soviet constituent republic of the Union.[19] The R.S.F.S.R. Code is there in force. In 1945, a considerable area of the Karelian isthmus with the cities of Viborg and Keksholm was transferred from the Karelian Republic to the R.S.F.S.R. and included in the Leningrad region. Likewise, the Petsamo (Pichenga) district acquired by the Soviet Union under the Finnish armistice of September 19, 1944, was included in the Murmansk region of the R.S.F.S.R.[20]

Two territories appeared on the list of electoral districts drawn up for the February, 1946, election to the U.S.S.R. Supreme Soviet,[21] although no official act has thus far been officially published declaring their incorporation. Tannu-Tuva (Uranhay), a Chinese territory under Russian control, thus far known as the Tannu-Tuvinian People's Republic with a status similar to that of former Bokhara (see *supra*), is listed in the edict as the Tuvinian Autonomous Region, a part of the R.S.F.S.R. The same list includes a section of East Prussia as the Königsberg area (okrug), renamed on June 30, 1946, the Kalinin region (*Kaliningradskaia*), included in the R.S.F.S.R.[22] though separated from it

[18] Section 4, *lex cit.*, note 16.
[19] August 8, 1940, Vedomosti 1940, Nos. 12 and 30.
[20] Shabad, *op cit.*, note 17 at 33, 34.
[21] Vedomosti 1945, No. 73; *id.* 1946, No. 5.
[22] The following districts (rayon) are included in the Kalinin (Königs-

UNION OF SOVIET SOCIALIST REPUBLICS

U. S. S. R.

FEBRUARY 25, 1947

FINNS

BALTIC

RUMANIANS

RUSSIANS

TRANSCAUCASUS

CENTRAL ASIA

FINNO-KARELIA

ESTONIA

LATVIA

LITHUANIA

MOLDAVIA

BYELORUSSIA

UKRAINE

R.S.F.S.R.

ARMENIA

AZERBAIJAN

GEORGIA

UZBEK

TADJIK

TURKOMAN

KAZAKH

KIRGHIZ

EUROPEAN RUSSIA

MONGOLS

FINNISH TRIBES

TATAR

BASHKIR

MARI

KOMI

CHUVASH

MORDOVIA

SIBERIA

CAUCASUS

UDMURT

BURYAT-MONGOL

YAKUT

NORTH OSSETIA

KABARDINO-BALKAR

DAGHESTAN

SIBERIA

CAUCASUS

OIROT

KHAKAS

JEWISH

TUNA-TUVA

ADYGEY

CHERKESS

NAKHI-CHEVAN

ADJAR

ABKHAZ

KARA-KALPAK

NAGORNO-KARABAKH

SOUTH OSSETIA

GORNO-BADAKHSHAN

12 REGIONS

25 REGIONS

53 REGIONS

9 REGIONS

4 REGIONS

4 REGIONS

16 REGIONS

6 REGIONS

1 2 3 4 5 6 7 8 9 10

LEGEND

- CONSTITUENT REPUBLICS WHICH INCLUDE AUTONOMOUS REPUBLICS OR AUT. REGIONS
- AUTONOMOUS REGIONS
- OTHER CONSTITUENT REPUBLICS
- ORDINARY REGIONS- *KRAY* or *OBLAST*
- AUTONOMOUS REPUBLICS
- NATIONAL DISTRICTS

BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DATE

by the Lithuanian and Byelorussian Republics. Both these areas elected deputies to the U.S.S.R. Supreme Soviet, but no information is available on the effect there of the soviet laws.

Finally, the inclusion of, in the Khabarovsk region of the R.S.F.S.R., the Southern Sakhalin and Kuril Islands as South Sakhalin Province was declared by the Edict of the U.S.S.R. Presidium of February 2, 1946,[23] and another edict of the same date provided for the nationalization of land and the other chief economic resources.[24] Outer Mongolia remains a people's re-

berg) area: Königsberg, Tilsit, Insterburg, Gumbinnen, Samland, Labiau, Pillkallen, Ragnit, Friedland, Tunnan, Heiligenbeil, Heinrichswalde, Stallupönen, Darkehmen. Königsberg was renamed Kaliningrad and its region Kaliningradskaia after the death of this long-time president of the Presidium. U.S.S.R. Laws 1946, text 191.

[23] Vedomosti 1946, No. 5, February 16, 1946, 4, the text of which follows:

The Southern Sakhalin Province with its capital in the city of Tojokhara shall be formed on the territory of the Southern Sakhalin and Kuril Islands and included in the Khabarovsk Region of the R.S.F.S.R.

[24] Vedomosti 1946, No. 5, February 16, 1946, 4:

1. Be it enacted that, as of September 20, 1945, all land together with subsoil, forests, and waters in the territory of the southern part of the island of Sakhalin and the Kuril Islands shall be in governmental ownership, i.e., the people's dominion.

2. Be it enacted that, as of September 20, 1945, the following shall also be nationalized:

(a) Banks and other credit institutions and savings banks, as well as railroad and water transport and means of communications (radio, telegraph, telephone), which are located in the territory of the southern part of the island of Sakhalin and the Kuril Islands.

(b) Enterprises in all branches of industry with more than ten workers situated in the territory of the southern part of the island of Sakhalin and the Kuril Islands.

3. The U.S.S.R. Council of People's Commissars is commissioned to establish a list of industrial enterprises subject to nationalization under Section 2 of the present edict.

4. Besides the enterprises specified in Section 2, the following shall also be subject to nationalization:

(a) All privately owned agricultural farms with a land surface over fifty hectares;

(b) Hospitals, large pharmacies, pharmaceutical stores, and sanatoria;

(c) Warehouses of commercial firms;

public allied with but not included in the Soviet Union.[25]

II. Soviet Democracy Before 1936

1. Constituency

Prior to 1936 the soviet constitutions, although making no discrimination of race, creed, or sex, did discriminate between citizens according to social standing, past or present, and occupation. The R.S.F.S.R. Constitution openly stated that "it deprives individuals or certain groups of individuals of rights which they use to the prejudice of the socialist revolution."[26] Social standing and not citizenship qualified a person to participate in the political life of the soviet land. Voting was unequal, indirect, and open. The soviet governmental machinery was built up in an unusual, particularly soviet, "pyramidal" or "peripheral" manner (see *infra*). These features were considered specific characteristics of a soviet or "proletarian" democracy.[27]

According to Lenin:

(d) Primary and secondary schools, institutions of higher education, and scientific research institutions;
(e) Movies and theaters;
(f) Large hotels and large houses, as well as houses whose owners have fled from the southern part of the island of Sakhalin;
(g) Electrical networks, and running water and sewage installations.
5. The R.S.F.S.R. Council of People's Commissars is hereby commissioned to establish a list of enterprises, houses, and institutions which are subject to nationalization under Section 4 of the present edict.

[25] Its independence was recognized by China in the exchange of notes with the Soviet Union of August 14, 1945, Vedomosti 1945, No. 59.

[26] R.S.F.S.R. Constitution 1918, Section 23; *id.* 1925, Section 14.

[27] Webb, 1 Soviet Communism 449–451; Timasheff, Grundzüge des Sowjetrussischen Staatsrechts (1925) 69–73; *id.*, "The Soviet Constitution," 16 (1941) Thought 630.

> Soviet democracy, that is, proletarian democracy, . . . consists in this: the electorate comprises the toiling and exploited masses, the bourgeoisie is excluded, all the bureaucratic formalities and limitations of elections are done away with . . . the best possible mass organization of the vanguard of the toilers—the industrial proletariat—is formed . . . to direct the exploited masses . . . and train them politically.[28]

Likewise, the Program of the Communist International stated:

> A state of the soviet type, being a supreme form of democracy, i.e., proletarian democracy, is sharply opposed to bourgeois democracy, which is a veiled form of the dictatorship of the bourgeoisie. The soviet State is the State of the proletariat, the power of this class alone. In contrast to bourgeois democracy, such a State recognizes frankly its class character and openly declares that its aim is the suppression of exploiters in the interest of the prevailing majority of the population. It deprives its class enemies of political rights, and it may, under particular historical conditions, give a number of privileges to the proletariat as compared with the scattered bourgeois peasantry, in order to secure the leading role of the proletariat.[29]

In accordance with these principles, citizens engaged in commerce or employing hired labor for profit, as well as priests and monks of all denominations, persons living on unearned income, and certain prerevolutionary officials (including former district attorneys) were excluded from the electorate.[30] But aliens residing in the Soviet Union and qualified as toilers were granted all the political rights of a soviet toiler.[31] Thus, an alien

[28] Lenin, 22 Collected Works (2d Russian ed.) 465.

[29] Program and Statute of the Communist International (Russian 9th ed. 1931) 65.

[30] R.S.F.S.R. Constitution 1918, Sections 64, 65; *id.* 1925, Section 68; U.S.S.R. Electoral Instruction 1934, Section 4; R.S.F.S.R. Electoral Instruction, Sections 15, 16.

[31] R.S.F.S.R. Constitution 1918, Section 64, Note 2; *id.* 1925, Section 68,

toiler enjoyed rights denied to a native who was considered a nontoiler. The predominance of urban population over rural was secured in the representative bodies. The urban population was given a representation five times greater than that accorded to the rural population, e.g., in the federal Congress of Soviets, the urban population was represented by one deputy for every 25,000, the rural by one deputy for every 125,000.[32] The ballot was open and indirect. The constituency elected directly only the primary lower nuclei of the soviet machinery, the village and city soviets. The votes were cast in an open ballot at electoral assemblies convoked at workshops, offices, and other places of employment. "The soviet government," said the Program of the Communist Party in 1935, "draws the government machinery closer to the masses also by the fact that the electoral constituency and basic unit of the State is no longer a territorial district but an industrial unit (work, factory)." [33]

2. Soviet Scheme of Authorities

The village and city soviet elected deputies to the district congresses; these elected the provincial and regional congresses, which in turn elected those of the constituent republics; and these last elected the federal Congress of Soviets.[34] Each congress elected an execu-

Note; U.S.S.R. Electoral Instruction 1934, Section 4; R.S.F.S.R. Electoral Instruction, Section 14.

[32] R.S.F.S.R. Constitution 1918, Sections 25, 53; *id.* 1925, Section 20; R.S.F.S.R. Laws 1928, text 503, Section 46; *id.* 1931, text 143, Section 4.

[33] Communist Party of the Soviet Union (Bolsheviks) Program and Rules (English revised ed. 1935) 17.

[34] U.S.S.R. Constitution 1923, Section 20; R.S.F.S.R. Constitution 1918, Sections 25, 53; *id.* 1925, Section 20; R.S.F.S.R. Laws 1928, text 503, Section 46; *id.* 1931, text 143, Section 4.

tive committee, and the latter elected a smaller body called a presidium. While a congress was not in session, its full power belonged to its executive committee, and, in the intervals between sessions of the latter, the full power belonged to the presidium.[35] The congresses had a very large membership; the federal comprised over 1,500 members[36] and those of the republics from 313 to 1,213. During the period from 1927 to 1931, they met uniformly once every two years for a short session of from three to seven days. The Executive Committee of the Union, the predecessor of the present Supreme Soviet (see *infra*), consisted of about 600 members, those of the republics of from 189 to 400 members, and those of the regions and autonomous republics of from 75 to 150.[37] The Presidium of the Union consisted of 29 members, and those of the republics and regions were even fewer in number. Thus, it was characteristic of the soviet system that, while full power was declared to be vested in the representative bodies, large in numbers but convening seldom and for short sessions, in the interim between sessions their authority was by constitutional provisions permanently delegated to continuously functioning smaller committees which actually exercised such power. It has been and remains typical of the membership of these committees that a high

[35] U.S.S.R. Constitution 1923, Sections 8, 26, 29; R.S.F.S.R. Constitution 1925, Sections 16, 27; Ukrainian Constitution, Sections 25, 32; Byelorussian Constitution, Sections 31, 34; Transcaucasian, Sections 12, 26; Georgian, Sections 3, 35; Armenian, Sections 24, 42; Azerbaijan, Sections 5, 33; Uzbek, Sections 3, 37; Turcoman, Sections 4, 32.

[36] The Congress of 1931, the last before the new Constitution, comprised 1,576 members. *Cf.* Central Electoral Commission Attached to the U.S.S.R. Central Executive Committee, Elections to the Soviets and the Composition of the Authorities of the U.S.S.R. in 1931 (in Russian 1931). All figures are taken from this publication.

[37] *Ibid.*

percentage is Communist.[38] On the other hand, the soviet official statistics reveal a minor percentage of actual workers and peasants, i.e., individuals pursuing their trades, among the members of the soviet representative bodies. Peasants formed only 15 per cent of the members of the Congress of Soviets of 1931, the last before the new Constitution, and only 9 per cent of the members of the Executive Committee, the respective percentages for workers being 22 and 13. Among the members of the Supreme Soviet elected in February,

[38] Per cent of Communists among the Members and Presidents of the Soviet Governmental Bodies in 1931:

A. Organs elected by indirect vote

Territorial divisions by rank of seniority	Congresses	Executive Committees	Presidia	Presidents
Union[i]	75%	81%	100%	—
Constituent republics[ii]	74–90%	77–85%	100%	100%
Regions and autonomous republics[iii]	66–83%	80–90%	80%	100%
Districts[iv]	51% (57% in 1934)[vii]	70% (78% in 1934)[vii]	90%	99.7%

B. Organs elected by direct vote

	Soviets	Presidia	Presidents
Cities[v]	56% (54% in 1934)[vii]	71%	73%
Villages[vi]	20% (30% in 1934)[vii]	44%	61% (83% in 1934)[vii]

[i] Central Electoral Commission attached to the Presidium of the Central Executive Committee of the U.S.S.R. Elections to the Soviets and the Composition of the Authorities in the U.S.S.R. (in Russian 1931). The Communist candidates and Komsomols are counted together with the party members. The figures for 1929 and the preceding elections show a lesser percentage of Communists among the lower authorities. Tables 25, 26, columns 35–37.

[ii] *Id.*, Tables 21, 22, columns 41–43, 40–42.

[iii] *Id.*, Tables 16, 17, columns 27–29; and Table 18, columns 26–29.

[iv] *Id.*, Table 12, columns 31–33; Table 13, columns 31–33; Table 14, columns 30–32; Table 15, columns 30–32.

[v] *Id.*, Table 9, columns 26–28; Table 10, columns 25–27.

[vi] *Id.*, Tables 5, 7, columns 30–32; Table 6, columns 29–31. In 1929 there were only 13% Communists.

[vii] *Id.*, Elections in the U.S.S.R. in 1934–1935 (in Russian 1935) 82–88.

1946, peasants—actual farmers—constitute 13 per cent and workers only 8 per cent of the total membership. The prevailing majority consists of members of the intelligentsia and former workers and peasants who at the time of election held various administrative posts in the soviet government machinery.[39] This permanent delegation of power seems to be a constant feature of the system; the practices thus established have continued under the 1936 Constitution, although it does not

[39] Soviet statistics classify the members of the soviet representative bodies in three groups: workers, peasants, and salaried employees (in recent publications, "intelligentsia"), but figures are also given showing the number among the workers and peasants of those who continue to pursue their trades and those who in fact occupy administrative posts. From these data the following tables are derived:

Percentages Among Members

	Workers		Peasants		Total of Workers and Peasants	
	by origin	actual	by origin	actual	by origin	actual
U.S.S.R. Congress 1931[i]	54.4	22.1	25.6	15.2	80	37.3
Executive Committee 1931[ii]	47.6	13	16.3	9.5	63.9	22.5
U.S.S.R. Supreme Soviet 1946[iii] ...	40	8	27	13	67	21

Percentages of Members Occupying Administrative Posts

	Total	Workers	Peasants	Salaried Employees
U.S.S.R. Congress 1931[i] ...	62.7	32.3	10.4	20
Executive Committee 1931[ii] ..	72.5	36.1	6.8	36.1
U.S.S.R. Supreme Soviet 1946[iii]	79	31	13	35

Peasants in the Imperial and Soviet Representative Bodies

	First Duma 1906	Fourth Duma 1916	Executive Committee 1931	Supreme Soviet 1946
By origin	35	19	16.3	20.7
Actual	30	13.6	9.5	13

[i] *Op. cit.*, note 38, Table 26.
[ii] *Id.*, Table 27.
[iii] Ananov, "Triumph of the Soviet Democracy" (in Russian 1946) Soviet State No. 3/4, 9.

provide for delegation of power with such definitiveness as the previous constitutions (see *infra*).

At the very beginning of the soviet regime the central Congresses had more prestige, as is evident from the fact that, during the first year of its existence, the Congresses were convoked five times and each passed on an important question, such as the peace treaty with Germany or the soviet Constitution. Since 1919, they have been convoked only once a year, and from 1927 to 1931, once every two years.[40] No Congress was convoked during the period 1931 through 1935, the very period when the most important features of Russia were changed. The Five-Year Plan, the industrialization,

[40]

Congresses	2d	3d	4th	5th	6th
	Establishment of Soviet rule		Treaty of Brest	Constitution	
Date	November, 1917	January, 1918	March, 1918	July, 1918	November, 1918
Per cent of Communists	53	52	68	60	97

The 7th–10th Congresses, after all other radical parties were outlawed, convened each December 1919–1922, and had Communist majorities of 92%, 95%, 93%, and 94%; the 11th had 90% and the 12th, i.e., the first after the R.S.F.S.R. became merely a state, had 79%.

The above figures are taken from the official records printed for each Congress on the respective date (. . . *S'ezd Sovetov*).

Exact figures on the partisan composition of the 2d Congress of the Soviets are not available. The socialist group which opposed the soviet power left the Congress, and the total number of members at the opening of the Congress was not ascertained. It is only known that it remained about 625 members, of which 390 were bolsheviks, 179 socialist revolutionists, 21 Ukrainian socialists, and 35 internationalists, the rest unknown. The preliminary record shows a total of 670, of whom 300 were bolsheviks, 193 socialist revolutionists, 7 Ukrainian socialists, 14 internationalists, 10 Jewish socialists (*Bund*), 68 mensheviks, 3 anarchists, 10 Polish socialists, 4 Lithuanians, 3 national socialists, 36 partyless, and 22 whose party affiliation is unknown. It seems that at the beginning the bolsheviks were in a minority (300 out of 670), that those who left constituted about 70, and that the bolshevik fraction increased at the expense of the others, the orignal opposition comprising about 130. Central Archives, The Second All-Russian Congress of Soviets, Kotelnikov, editor (in Russian 1928) XXV, 170–171.

the forcible collectivization of peasant agriculture, were decided upon and carried out without convening the Congress. The constitutional provision requiring the convocation of the Congress every second year had not been changed but merely disregarded. Since 1927, the Congresses have ratified laws put into effect a long time before with little if any discussion and with all decisions being made unanimously. In the 1936 Constitution the Congresses were dropped from the governmental scheme altogether. The Supreme Soviet now in existence is, by its size and bicameral composition, the successor of the Executive Committee and not of the Congress.

On the republican and federal levels, the machinery was quite complex. In addition to the Congress of Soviets, the Executive Committee, and its Presidium, there were Councils of People's Commissars, elected by the Executive Committees, and in the federal government also a Council of Labor and Defense.[41] The jurisdiction of these bodies was defined in broad terms, and thus all five supreme bodies exercised both legislative and executive functions, a situation regarded as a matter of principle.[42] In the words of Steklov, who was

[41] The Congresses and the Executive Committees were defined as organs of supreme power, U.S.S.R. Constitution 1923, Sections 8, 29, 37, 38; R.S.F.S.R. Constitution 1926, Sections 3, 24, 27, 34. The Presidium was designated as "the supreme legislative, executive, and directive organ," U.S.S.R. Constitution 1923, Section 29; R.S.F.S.R. Constitution 1926, Section 27. The Council of People's Commissars was defined as the executive and directive organ authorized to issue decrees and resolutions having binding force in the whole territory of the Union, U.S.S.R. Constitution 1923, Sections 37, 38; R.S.F.S.R. Constitution 1926, Sections 33, 34. The Council of Labor and Defense was created by the Laws of July 17, and August 21, 1923, R.S.F.S.R. Laws 1923, text 946; its resolutions were binding on all the authorities of the Union. See also Resolutions of the Eighth Congress of the R.S.F.S.R. Congress and Malitsky, Soviet Constitution (in Russian 4th ed. 1928) 464.

[42] *Ibid.*

the spokesman of the government at the discussion of the Constitution in 1918 at the Fifth Congress of Soviets:

> While the bourgeois constitutions, inspired by the doctrinalism of the propertied classes . . . make an artificial separation between the executive, the legislative, and the judicial powers, we in our Constitution attempted insofar as possible to concentrate all these functions in one central organ, such as are the all-Russian Congress of Soviets, the Executive Committee elected by the Congress, and the Council of People's Commissars responsible before the Congress.[43]

The Program of the Communist Party stated later that the soviets abolished "the negative aspect of parliamentary government, especially the separation of the legislature from the executive, the isolation of the representative institutions from the masses, etc." [44]

III. Soviet Democracy Under the 1936 Constitution

1. Elections

In contrast to this scheme, the 1936 Constitution has introduced certain democratic devices but still rejects others. The right to vote is accorded to all citizens of the Soviet Union who have reached the age of eighteen, irrespective of race, sex, religion, social origin, or occupation (Sections 134–135). The right to be elected also was originally given to those who reached the age of eighteen, and not until 1945 was the age requirement raised to twenty-three years.[45] Thus, the franchise is

[43] The Fifth Congress of Soviets (in Russian 1919) 185. See also Gurvich, The Soviet Constitution (in Russian 5th ed. 1926) 82 *passim*.

[44] *Loc. cit.*, note 33.

[45] Edict of Presidium of October 10, 1945, Vedomosti 1945, No. 72. The age requirement for members of the supreme soviets of the individual soviet republics was raised to twenty-one by the Edict of October 10, 1946 (Vedomosti 1946, No. 38).

defined in accordance with true democratic principles. Furthermore, the soviet pattern of organization of the government machinery described above was abandoned. A single supreme body, the Supreme Soviet (Council), is designed under the Constitution to be the legislative body (Section 30) and is elected directly by a secret ballot cast by each electoral district (Sections 34, 135, *et seq.*). The representation of the rural and urban population is equal. On the other hand, free electoral campaigning by political parties is denied as before. The monopoly of the Communist Party for all political activities in the Soviet Union is written into the Constitution (Section 126), and its exclusive control of the nomination of candidates is secured (Section 141). In presenting the draft of the Constitution, Stalin explained these features as follows:

I must admit that the draft of the new Constitution really does preserve the regime of the dictatorship of the working class, just as it also preserves unchanged the present leading position of the Communist Party of the U.S.S.R. If our esteemed critics regard this as a flaw in the Draft Constitution, it is only to be regretted. We Bolsheviks regard it as a merit of the Draft of the Constitution.

As to freedom for various political parties, we adhere to somewhat different views. A party is a part of a class, its foremost part. Several parties, and, consequently, freedom for parties, can exist only in a society in which there are antagonistic classes whose interests are mutually hostile and irreconcilable, in which there are, say, capitalists and workers, landlords and peasants, kulaki and poor peasants, etc. But in the U.S.S.R. there are no longer such classes as capitalists, landlords, kulaki, etc. In the U.S.S.R. there are only two classes, workers and peasants, whose interests are not only not mutually hostile, but, on the contrary, are friendly. Consequently, in the U.S.S.R. there is no ground for the existence of several parties, and, consequently, for freedom for these parties. In

the U.S.S.R. there is ground only for one party, the Communist Party.[46]

The salient point of the statement is that "the new Constitution really does preserve the regime of the dictatorship of the working class."

2. The Doctrine of Dictatorship of the Proletariat

Such dictatorship is a central point in the soviet doctrine of government and of law. Its concept is by no means simple. The term dictatorship of the proletariat was barely mentioned by Marx[47] but developed at length by Lenin and Stalin. Before his advent to power, Lenin offered what he called a scholarly definition of dictatorship in general as "a power with no restriction whatsoever, absolutely unbound by any rules of law and based upon violence," or "unlimited power based upon force and not law." [48] These definitions form the background of soviet legal writings, both before and after 1936.[49] However, with regard to the dictatorship of

[46] Stalin, On the Draft Constitution of the U.S.S.R., Report Delivered at the Extraordinary Eighth Congress of Soviets of the U.S.S.R., November 25, 1936 (English ed. Moscow, 1936) 29.

The "class point of view" is discussed *infra*, Chapter 5, II, 6.

[47] Between the capitalist and the communist society lies a period of transformation from one to the other. There also corresponds to this a political transition period during which the State can be nothing else than the revolutionary dictatorship of the proletariat. Karl Marx, Critique of the Gotha Programme, with Appendices by F. Engels and V. I. Lenin (New York 1933) 44–45; similar Russian ed. (1923) 63.

Karl Kautsky, the noted German Marxist, considered this passage of Marx immaterial. He tried to reconcile Marxist communism with political democracy and criticized Lenin's interpretation. Kautsky, Die Proletarische Revolution und ihr Programm (1st ed. 1922, 3d ed. 1932) 89 *passim;* English translation by Stemuny, (1925) The Labour Revolution.

[48] Lenin, 9 Collected Works (2d Russian ed.) 95, 117; *id.* 7 Collected Works (1st Russian ed.) Pt. 1, 122, 124.

[49] E.g., Malitsky, *op. cit.*, note 41, 36; Engel, Fundamentals of the Soviet Constitution (in Russian 1923) 48; Gurvich, Fundamentals of the Soviet Constitution (in Russian 4th ed. 1924) 43; Denisov, Soviet Constitutional Law (in Russian 1940) 34.

the proletariat, Lenin and Stalin added some special characteristics. Thus, according to Lenin:

> Dictatorship of the proletariat does not mean force alone, although it is impossible without the use of force; it also means organization of labor on a higher level than the previous organization. . . . Its quintessence is the organization and discipline of the advance detachment of the working people, of their vanguard, their sole leader, the proletariat. . . .[50]

Commenting on these statements, Stalin said:

> The dictatorship of the proletariat has its periods, its special forms, its diverse methods of work. During the period of civil war, the violent side of the dictatorship is most conspicuous . . . During the period of socialist construction, on the other hand, the peaceful organizational and cultural work of the dictatorship, legality, etc., are most conspicuous. But here again it by no means follows that the violent side of the dictatorship is fallen off, or can fall off, in the period of construction.
>
> The [Communist] Party exercises the dictatorship of the proletariat. . . .
>
> The [Communist] Party is the main guiding force in the system of the dictatorship of the proletariat . . . The highest expression of the leading role of the Party here in the Soviet Union, in the land of the dictatorship of the proletariat, for example, is the fact that not a single important political or organizational question is decided by any soviet or other mass organization without guiding directions from the Party. In *this sense*, it could be said that the dictatorship of the proletariat is *in essence* the "dictatorship" of its vanguard, the "dictatorship" of its Party, as the main guiding force of the proletariat.[51]

Visualizing the foundation of the soviet government as the dictatorship of the proletariat exercised in its name by the Communist Party, the authors of the soviet theory of government drew two conclusions. The

[50] Lenin, 24 Collected Works (2d Russian ed.) 305, 314.
[51] Stalin, Problems of Leninism (English ed. 1940) 131, 134, 135.

Communist Party must have a monopoly on political activities, and the power of the government may not be restricted. Therefore, the methods of Western democracy designed to restrict the power of the government, such as the separation of powers, the doctrine of checks and balances, the principle of government by law, are denied by them, as will be shown *infra*, in the discussion of the machinery of the central government.

3. Political Monopoly of the Communist Party

At this point it may be stressed that, in conformity with this philosophy, the monopoly of the Communist Party of political activities in the Soviet Union is expressed in the Constitution by assigning to it the role of "the directive body of all organizations and societies of toilers, both public and governmental" (Section 126). Having thus secured to the Communist Party dominance in all soviet organizations, the Constitution gives the Party the exclusive right to nominate candidates for election to the soviet representative bodies. "The right to nominate candidates is secured to public organizations and societies of toilers: Communist Party organizations, trade-unions, co-operatives, youth organizations, and cultural societies" (Section 141).[52] In elections

[52] The new Statute on Elections, approved by the U.S.S.R. Presidium on October 11, 1945 (Vedomosti 1945, No. 72), defines the nomination procedure as follows:

Section 57: On the ground of Section 141 of the U.S.S.R. Constitution the right to nominate candidates for deputies to the U.S.S.R. Supreme Soviet shall be secured to public organizations and societies of toilers: the Communist party organizations , trade-unions, co-operative organizations, youth organizations and cultural societies.

Section 58: The right to nominate candidates shall be exercised both by the central organs of public organizations and societies of toilers as well as by their republican, regional, provincial, county, and district organs, as well as by general meetings of wage earners and salaried employees

thus far held, only one ticket has been placed on the ballot, viz., that of "the block of communists and those without party affiliation." In commenting on the elections scheduled for February, 1946, *Pravda* repeated in its editorial the argument of Stalin quoted above and in spite of the absence of political parties other than the Communist, insisted that the soviet land is "the foremost and most consistent democracy of the world." [53]

Such an electoral system taken as a whole does not make the soviet elections democratic in the Western sense. However, the departure from certain principles once considered essential to the soviet regime and some concession to the ideas of Western democracy are significant. If the absence of free political campaigning and the control of nominations by a single party are overlooked or omitted, the soviet elections may appear democratic even if they are not.

IV. Bill of Rights in the 1936 Constitution

1. In General

In contrast to the 1923 federal Constitution, which did not contain a bill of rights, the 1936 Constitution has a chapter on "Fundamental Rights and Duties of Citizens" (Sections 118–133). However, the provisions dealing with political liberties are not, in fact, new but have been taken over with slight rephrasing from the

in an establishment, of men in the armed forces by military units, by general meetings of farmers convoked for a collective farm, village, or township, or of employees of soviet governmental farms convoked for such farms.

For a recent description of soviet elections, see Bulygin (pseud.), "I Was a 'Free' Russian," 65 (1947) The American Mercury 133.

[53] Pravda, November 4, 1945.

constitutions of individual constituent republics.[54] In this respect, the 1936 Constitution did not bring about any changes in soviet constitutional law. Typical of the republican and new federal provisions is their statement of certain freedoms, but the original statement is followed by qualifying clauses, which suggest that these freedoms are conceived in a manner different from the tradition of the Western democracies.

Thus, "freedom of speech, freedom of the press, freedom of assembly, and freedom of street procession and demonstration" are regarded as "ensured by placing at the disposal of the toilers and their organizations printing presses, stocks of paper, public buildings, streets, communication facilities, and other material requisites for the exercise of these rights" (Section 125). Since the soviet government and the Communist Party are visualized as the representatives of the toilers and the directive body of their organizations (Section 126), the statement of the freedoms in fact places the facilities for their exercise in the hands of the government and one exclusive group.[55] The soviet Law of 1932 concerning printing, which is still in force, states more definitely that printing offices of any kind, including those using hectographs, and also trading in printing equipment,

[54] R.S.F.S.R. Constitution 1918, Sections 14, 15, 16; *id.* 1925, Sections 5, 6, 7.

[55] These provisions may be compared with those of the old R.S.F.S.R. Constitution: "To insure to the toilers actual freedom in the expression of their opinion, the R.S.F.S.R. has abolished the dependence of the press on capital and hands over to the working class and peasantry all technical and material resources necessary for publication of newspapers, pamphlets, books and other printed matter. . . ." R.S.F.S.R. Constitution 1918, Section 14; *id.* 1925, Section 5. "To secure actual freedom to the toilers . . . the R.S.F.S.R. places at the disposal of the working class and the peasantry all premises fit for public gatherings." *Id.* 1918, Section 15; *id.* 1925, Section 6. In fact, these provisions are in tendency confiscatory and establish monopoly rather than freedom.

"may be opened only by government agencies, co-operatives, and public organizations." [56]

2. The Press Law

Censorship is a permanently functioning institution and is exercised by *Glavlit,* the main office for literary and publication affairs. It was established "for the carrying out of all kinds of political and ideological, military, and economic control of printed matters, manuscripts, photographs, pictures, etc., destined for publication or circulation and of radio messages, lectures, and exhibitions.[57] Works to appear in print are censored twice, viz., before going to print and after printing.[58] The purpose of censorship is to exercise "ideological leadership," i.e., not merely to check any anti-soviet material, but primarily to permit the publication of only such works as are directly contributive to the governmental policy of the day. The main lines of the policy are usually given in the decisions of the Central Committee of the Communist Party.[59] Even government agencies require a special permit for the acquisition of printing equipment or the operation of a printing office. With the exception of the Communist International

[56] R.S.F.S.R. Laws 1932, text 288, Section 1; see also the Instruction issued jointly by the Chief Police Office and the Committee on Press Affairs of September 23, 1932, Sections 1, 2; see Fogelevich (editor), Basic Directives Concerning the Press (in Russian 4th ed. 1934) 164–171.

[57] Statute on Glavlit, R.S.F.S.R. Laws 1931, text 273, Section 1; *id.,* text 347.

[58] *Id.,* Section 3, subsection "b." In fact, the entire process of printing, including proofreading, is under censorship. The supervision of printing is worked out in detail in the Rules of Glavlit of July 31, 1936, and the Order of February 19, 1936, No. 65. Fogelevich, *op. cit.* (6th ed. 1937) 137.

[59] E.g., Resolution of August 15, 1931, Pravda, September 3, No. 248; Fogelevich, *op. cit.* 5 *passim.*

when it existed, the central and local committees of the Communist Party, *Izvestiia,* and the Academy of Science, government agencies exercise printing activities under the *Glavlit* and are bound to a strict accounting and reporting of the paper and lead used.[60]

Government monopoly for printing and strict censorship imply particular limitations on copyright, which is discussed in Chapter 16.

3. Other Rights

Other liberties are declared with similar qualifications. While soviet citizens are guaranteed inviolability of person, the Constitution permits arrest not only by court decision but also by sanction of a government attorney (Section 127).

Among the fundamental rights stated in the Constitution, equality of rights of citizens regardless of nationality, race, or sex is stated without qualification and is thus applied (Sections 122, 123). The right to work is also stated, but it is obviously conceived as an economic opportunity rather than a legal right, because its guarantee is seen in the general economic organization of the Soviet Union (Section 118). The right to rest and leisure is considered ensured "by reduction of the working day to seven hours" and by "annual vacations with full pay for salaried employees and wage earners" (Section 119). The normal working day was changed to eight hours by the Edict of the Presidium of June 26,

[60] R.S.F.S.R. Laws 1931, text 273, Section 5. Private publishing of books was permitted during the New Economic Policy but required a license under the Decree of December 12, 1921. R.S.F.S.R. Laws 1921, text 685. Issuance of such licenses has been discontinued, although the law has not been abrogated.

1940,[61] and the mass of collective farmers who are not employees do not have the benefit of vacations. For the duration of the war, vacations were abolished and mandatory overtime was introduced.[62] Likewise, "the right of maintenance in old age and in case of sickness or loss of capacity to work" at State expense refers only to employees (Section 120). Social security for collective farmers is left to the farms themselves.[63] The provisions with regard to the right to education (Section 121) have been modified to the extent that a tuition fee is required in the higher grades of secondary schools and in the institutions of higher education (see p. 74), unless a scholarship is granted.

4. Religion

Prior to 1936, the soviet federal Constitution did not deal with religion. The new Constitution restated the rather uniform provisions of the constitutions of the individual republics. However, these underwent a substantial change in 1929. Prior to that date, the constitutions of the R.S.F.S.R. and other republics provided as follows: "To insure for the toilers religious freedom, the Church is separated from the State and the schools from the Church, while freedom of religious and antireligious propaganda is secured to all citizens."[64] In 1929, "freedom of religious propaganda" was omitted, and the concluding clause was modified to read, "while freedom of religious persuasion and antireligious

[61] Vedomosti 1940, No. 20, July 5, 1, and No. 28, August 22, 2, ratification by the Supreme Council. The six-hour working day was retained for dangerous jobs enumerated in the U.S.S.R. Laws 1940, text 436.

[62] Edicts of June 26, 1941, and April 2, 1942, Vedomosti 1941, No. 30, July 2, 1; *id.* 1942, No. 13.

[63] Standard Charter of a Collective Farm 1935, Section 11, subsection (c). See Volume II, No. 30.

[64] R.S.F.S.R. Constitution 1918, Section 13; *id.* 1925, Section 4.

propaganda is secured to all citizens."[65] In the 1936 federal Constitution, the opening clause was made a separate sentence and the second sentence reads: "Freedom of practice of religious cults and freedom of anti-religious propaganda is recognized for all citizens." Comments made on the modified text interpreted it as barring religious propaganda and restricting religious activities to "the practice of the cult (prayer, performance of ceremonies, and similar things)."[66] An essential change in the attitude of the soviet government toward the Russian Orthodox Church took place later in 1941, but it is not yet included in any constitutional or statutory provisions (see *infra,* p. 147 *et seq.*).

5. Duties

A particular feature of the soviet Constitution is that it especially mentions some specific duties of the citizens: the duty to work (Section 12), "to observe the laws, to maintain labor discipline, honestly to perform public duties and the rules of socialist community life" (Section 130). The duty "to safeguard and strengthen public, socialist (i.e., primarily government) property" is particularly stressed, and all those who fail to

[65] The constitutions of the Ukraine (Section 8), Turkoman (Section 6), and Uzbekistan (Section 5) adopted the modified text of the R.S.F.S.R. Constitution, while the Byelorussian (Section 12), Azerbaijan (Section 6), and Armenian (Section 5) constitutions kept the original text until 1936. Until 1936, the Georgian Constitution (Section 11) stated that religious propaganda is recognized "insofar as it serves no political or social purposes." Simultaneously with the change of constitution, a new R.S.F.S.R. law on religious associations was enacted (R.S.F.S.R. Laws 1929, text 353). For a survey in English, see Gsovski, "The Legal Status of the Church in Soviet Russia" (1939) Fordham L. Rev. 1.

[66] Orleansky, The Law on Religious Associations in the R.S.F.S.R. (in Russian 1930) 11; Putintsev, Freedom of Conscience in the U.S.S.R. (1937) Under the Banner of Marxism (in Russian) No. 2, 71, 75, 76.

perform it are declared public enemies (Section 131). The clause concerning universal military service is followed by a threat to punish treason "with all severity of the law as the most heinous of crimes" (Sections 132, 133).

V. Central Government Bodies

1. Council of Ministers

The machinery of the central government as outlined by the 1936 Constitution appears at first glance more similar to that of other countries than formerly. But a closer analysis reveals essential differences. Thus, there is one representative assembly called the Supreme Soviet (Council), which is elected by direct secret ballot and is defined as the "sole legislative body" (Section 59). There is also a body defined as "the government" in the Constitution and appointed by the Supreme Soviet. Until 1946 it carried the name of Council of People's Commissars given to it by Lenin at the suggestion of Trotsky during the first night after the *coup d' état* in 1917.[67] On March 19, 1946, the Constitution was amended by changing the name of the Council of People's Commissars to the Council of Ministers,[68] which is the traditional Russian name for a constitutional cabinet.[69] The heads of the principal government

[67] Trotsky, 2 My Life (in Russian 1930) 59, 60.

[68] Vedomosti 1946, No. 10.

[69] When the first cabinet was definitely established by a statute in 1801, the name of Committee of Ministers was given to it. But, side by side with it, a Council of Ministers was established in 1857, being subsequently regulated by the Ordinance of 1861. It consisted not only of ministers but also of several other members appointed by the Emperor and functioned as the Emperor's consultative body without a definite jurisdiction. From 1881 to 1905 it did not meet at all, all the major powers being assumed by the Committee of Ministers. But when in 1905 the representative form

departments, theretofore called People's Commissars, were also on March 19, 1946, traditionally renamed as ministers. The Council of Ministers consists of a chairman, eight vice-chairmen, and all ministers and heads of those central government departments that have the status but not the name of a ministry, e.g., the chairman of the State Planning Commission (Section 70). The total membership is at present about sixty.

However, the resemblance of the Supreme Soviet to a legislature, and of the Council of Ministers (People's Commissars) to a cabinet, is no more than superficial, in view of the role actually played by these institutions in the entire organization of the central government.

2. Presidium

The Supreme Soviet also elects a body of thirty-three members called the Presidium, which has multifarious functions (Section 48).[70] The Soviet Union has no

of government was established, the Committee of Ministers was abolished and the functions of a cabinet in a constitutional regime with somewhat broader executive power were granted to the Council of Ministers by the imperial Edicts of April 23 and October 9, 1906.

[70] It seems that in 1946 some unwritten changes took place in the composition of the Presidium in addition to those enacted. Prior to March 19, 1946, the Presidium consisted of a president, sixteen vice-presidents, twenty-four members, and a secretary (Section 48). On the above-mentioned day, the number of members was reduced to fifteen. Although the number of vice-presidents is the same, being equal to the number of constituent republics, the vice-presidents were previously individually elected. Nevertheless an official communiqué was printed in Vedomosti of July 1, 1946, No. 23, the official law journal, stating that on June 23, 1946, the Presidium held a session "consisting of the presidents of the presidia of the constituent republics, being vice-presidents of the U.S.S.R. Presidium, and the members of this Presidium." Thus it seems that at present the vice-presidents of the U.S.S.R. Presidium are, in fact, the presidents of the presidia of the constituent republics. It is of course unknown whether election as president of the presidium of a constituent republic carries with it the vice-presidency of the U.S.S.R. Presidium or vice versa. It is however characteristic that both offices are officially considered fused.

president or chief executive, and the Presidium is assigned the functions normally exercised under a republican constitution by the president; it convokes and dissolves the Supreme Soviet, awards decorations, appoints and removes high army and navy commanders and diplomatic representatives, exercises the right of pardon, etc. But besides that, it ratifies international treaties, may abrogate resolutions and orders of the federal Council of People's Commissars (Council of Ministers since 1946) and of those of the constituent republics, and "interprets the laws in force and issues edicts" (ukases) (Section 49).[71] The power to issue edicts is nowhere precisely defined.

[71] U.S.S.R. Constitution of 1936, as amended February 25, 1947 (Vedomosti 1947, No. 8):

49. The Presidium of the U.S.S.R. Supreme Soviet shall:

(a) Convoke the sessions of the U.S.S.R. Supreme Soviet;

(b) Issue edicts:

(c) Interpret laws of the U.S.S.R. in force;

(d) Dissolve the U.S.S.R. Supreme Soviet in conformity with Section 47 of the Constitution of the U.S.S.R. and order new elections;

(e) Conduct referenda on its own initiative or on the demand of one of the constituent republics;

(f) Repeal resolutions and orders of the U.S.S.R. Council of Ministers and of the councils of ministers of the constituent republics in case they do not conform to law;

(g) In the intervals between sessions of the U.S.S.R. Supreme Soviet, relieve of their posts and appoint Ministers on the recommendation of the Chairman of the U.S.S.R. Council of Ministers, subject to subsequent confirmation by the U.S.S.R. Supreme Soviet;

(h) Establish decorations, medals, and titles of honor of the U.S.S.R.;

(i) Award decorations and confer titles of honor of the U.S.S.R.;

(j) Exercise the right of pardon;

(k) Establish military, diplomatic, and other special ranks;

(l) Appoint and remove the higher commanders of the armed forces of the U.S.S.R.;

(m) In the intervals between sessions of the U.S.S.R. Supreme Soviet declare a state of war in the event of armed attack of the U.S.S.R., or whenever necessary to fulfill international treaty obligations concerning mutual defense against aggression;

(n) Order general or partial mobilization;

(o) Ratify and denounce international treaties of the U.S.S.R.;

(p) Appoint and recall diplomatic representatives of the U.S.S.R. to foreign states;

In fact, only very few interpretations of laws have thus far been issued by the Presidium in the form of edicts,[72] but numerous edicts issued between the sessions of the Supreme Soviet have enacted countless essential changes in existing legislation (e.g., radical changes in the marriage and divorce and the inheritance laws), or in the provisions of the Constitution. Some edicts changing the Constitution are in the nature of direct amendments, e.g., new government departments are created, or those provided for in the Constitution are merged and subdivided.[73] In 1945 the age of those eligible to membership in the Supreme Soviet was changed by edict of the Presidium from eighteen to twenty-three.[74] Other edicts affect the Constitution by introducing rules departing from constitutional provisions, for example, the eight-hour normal working day was thus introduced in 1940,[75] instead of the seven-hour day provided for in

(q) Receive the credentials and letters of recall of diplomatic representatives accredited to it by foreign states;

(r) Declare martial law in separate localities or throughout the U.S.S.R. in the interests of the defense of the U.S.S.R. or for the purpose of ensuring public order and state security.

[72] Vedomosti 1940, No. 28; *id.* 1941 Nos. 25, 32. All of these in fact introduced new statutory provisions. The first stated that petty larceny of employees in industrial establishments should be tried by regular courts and not camerad-courts. The other two made children above fourteen accountable for crimes intentionally committed.

[73] E.g., the Commissariat for the Interior was subdivided and then fused; the Commissariat for Defense Industries was subdivided into four others (Aviation, Armament, Ammunition, and Shipbuilding Industries). Vedomosti 1939, Nos. 1, 2, 4, 16 page 4; *id.* 1940, Nos. 15, 31. See also Ukases of July 8, 1944, and March 14, 1945, *infra*.

[74] The Electoral Law was changed by Edict of October 10, 1945, Vedomosti 1945, No. 72. See also the Statute on Elections, Section 3, promulgated on the same date.

[75] Edict of June 26, 1940, Vedomosti 1940, No. 20, ratified by the Supreme Soviet, August 22, *id.* No. 28.

U.S.S.R. Constitution as amended February 25, 1947 (Vedomosti 1947, No. 8):

119. The right to rest is secured by establishing, for the wage earning and salaried employees, an eight-hour workday and by reducing the working hours to seven or six a day for a number of occupations with hard

Section 119, which remained unchanged until February 25, 1947. Then, after a lapse of seven years, this section was amended to incorporate the new rules. Such edicts are subsequently presented to the Supreme Soviet when it convenes, and it ratifies them *ex post facto*.

The Supreme Soviet convenes normally only twice a year (Section 46), and its sessions last only a few days. Therefore, the bulk of current legislation is to be found in the edicts of the Presidium, which in this manner continues to proceed in line with the practice established under the provisions of the old 1923 Constitution (see *supra*, II). Thus the Presidium continues to exercise the full power of the Supreme Soviet in the intervals between its sessions, although the 1936 Constitution delegates to the Presidium in such interims only the power of appointment and dismissal of Ministers, formerly People's Commissars, and the power to declare war.

Moreover, the Council of People's Commissars—Council of Ministers since 1946—in contrast to the American Cabinet, acts as a body in issuing decrees, orders and other acts which are "binding throughout the territory of the Soviet Union" (Section 67). Such acts are supposed to be issued "on the basis and in pursuance of the laws in force" (Section 66). Nevertheless, in some instances the provisions of the acts of the Council of Ministers are directly contrary to those of the Constitution, and the correctness of such practice has never been challenged. For example, although Section 121 of the Constitution provides that "education, includ-

working conditions, and to four hours in shops with especially hard working conditions; [also] by establishing annual leave with pay for employees; and by placing a network of sanatoria, rest homes, and clubs at the service of the toilers.

ing higher education, is free of charge," the Council of People's Commissars enacted in 1940 a tuition fee for the higher grades of secondary schools and for higher education.[76] A constitutional amendment incorporating the change thus enacted was passed as late as February 25, 1947.

3. Doctrine of Separation of Powers Repudiated

This shows that the use of the terms legislative and executive in the new Constitution has not eliminated the uncertain interrelations among the supreme government authorities typical of the old Constitution. And, in fact, the present soviet constitutional doctrine does repudiate, as it did before, the doctrines of separation of powers and of checks and balances. Vyshinsky, the former Attorney General, now Deputy Minister of Foreign Affairs, commented upon the new Constitution: "We do not have the separation of powers but the distribution of functions. . . . This has nothing in common with the Montesquieu doctrine."[77] The textbook on constitutional law published under his editorship in 1938 stated likewise:

> The soviet regime is permeated from top to bottom by the general spirit of unity of the governmental power of the toil-

[76] U.S.S.R. Laws 1940, texts 637, 676, 698.

U.S.S.R. Constitution as amended February 25, 1947 (Vedomosti 1947, No. 8):

> 121. Citizens of the U.S.S.R. shall have the right to education.
> This is secured by universal obligatory primary education; by making seven years of education free of tuition; by the system of governmental scholarships for outstanding students in institutions of higher learning; by conducting the teaching in schools in the mother tongues; by the organization at factories, government farms, machine and tractor stations, and collective farms of productive, vocational, and agricultural training for toilers, free of charge.

[77] Vyshinsky, "The Stalin Constitution" (in Russian 1936) Socialist Legality Nos. 8/9, 12.

ers. The program of the Communist Party repudiates the principle of separation of powers.[78]

This is, after all, a logical conclusion to be drawn from the dictatorial concept of government power discussed *supra*. Under such a philosophy, all the soviet supreme governmental bodies, viz., the Supreme Soviet, its Presidium, and the Council of People's Commissars, proceed on an almost equal basis in the solution of all current administrative and legislative problems (including constitutional amendments), irrespective of the designation of the body as legislative, executive, directive, et cetera. The more recent act is enforced, even in preference to one issued earlier by an authority which, under the Constitution, controls the authority enacting such later act.

Thus, soviet legislation may take the form of an act of the Supreme Soviet, technically called a law, an act of the Presidium, called an edict, or an act of the Council of People's Commissars, Ministers since 1946, called a decree, an order, an instruction, a resolution, or a statute. All these acts, as well as the executive orders issued by individual People's Commissars (Ministers), constitute the body of statutory law which governs the Soviet Union (see *infra*).

The position of the judiciary in the soviet system is discussed in Chapter 7.

4. Communist Party

The directive role of the Communist Party is *inter alia* expressed in the fact that many important enact-

[78] Vyshinsky and Undrevich, Soviet Constitutional Law (in Russian 1938) 390. "In fact," says the same book, "the history of the capitalist world does not know any actual separation of powers, separation of powers has never existed." *Id.* 296.

ments are officially promulgated as joint resolutions of the Council of People's Commissars—Council of Ministers since 1946—and the Central Committee of the Communist Party, over the signatures of the Chairman of the Council and the Secretary-General of the Communist Party. There are no statutory provisions governing such joint resolutions. This practice started under the old Constitution about 1932 and still continues.[79]

During the reconstruction period, 1930–1935, the agencies of the Communist Party often proceeded as official government organs. The Central Committee of the Communist Party has occasionally passed resolutions which were in form and in fact direct orders addressed to the governmental bodies.[80] Some of these resolutions were followed by official laws of identical content promulgated at the same time.[81] Others took effect of their own authority and were carried out without having been repeated in a formal legislative act.[82]

[79] E.g., seventeen such acts were issued in 1932, thirty-six in 1933, etc. See U.S.S.R. Laws 1933, texts 18, 30, 43, 50, 73, 74, 80, 81, etc.; *id.* 1934, texts 1, 22–24, 52, 54; *id.* 1940, texts 1–4, 79–84, etc.; *id.* 1941, texts 1, 26, 40–44, 58, 331; *id.* 1944, text 25; *id.* 1946, texts 254, 255.

[80] E.g., Resolution of the Central Committee of the Communist Party of April 2, 1930: "to request the Central Executive Committee, the Council of People's Commissars, and the Commissar for Commerce . . ." (Izvestiia, April 3, 1930, No. 92); also Resolution of March 26, 1932: "The Central Committee of the Communist Party orders all the organizations of the Party, those of the soviets and those of the collective farms . . . " (Pravda, March 27, 1932, No. 86); also Resolution of July 30, 1930 (Pravda, August 2, 1930, Nos. 211, 3).

[81] E.g., the abolition of the most important department, the Supreme Council of National Economy, was decided by the Central Committee of the Party on January 5 (Pravda and Izvestiia, January 5, 1932, No. 5) and carried out in the form of a law enacted jointly by the Council of People's Commissars and the Central Executive Committee on the same day. (U.S.S.R. Laws 1932, text 4.) The law allowing the collective farms to sell their products on the free market, after delivery to the government of the tax levied in kind, states in the preamble that "it was issued on the ground of the decree of the Council of People's Commissars and of the Central Committee of the Communist Party." (U.S.S.R. Laws 1932, text 17.)

[82] E.g., Resolution of the Central Committee of the Communist Party of August 25, 1932, Concerning the Schools, introduced substantial changes in

In many instances, such resolutions have been addressed to individual government departments or government enterprises, giving them immediate instructions on their current activities.[83] Occasionally they have repealed decisions of the local governments, and the comments to be found in the soviet legal press do not define such practice as illegal.[84]

The role of the Communist Party in the soviet machinery of government is described by a soviet textbook of 1945 in the following terms:

> Comrade Stalin teaches that the Communist Party directs the government machinery. The Communist Party through its members working in the government agencies guides their work and directs their activities.
>
> By experience the following basic forms of Party leadership of the government machinery were worked out:
>
> (1) The decisive point is the fusion of the Party "top levels" with the "top levels" of the soviets, about which Lenin wrote: "they are fused in our system and shall so remain" (27 Collected Works 252; 30 *id.* 422). But the economic, administrative, public, cultural and other of our institutions are not institutions of the Communist Party;

the curriculum, restricted self-government of the teachers, and otherwise affected the whole of the school system. (Pravda 1932, August 28 and 29, Nos. 238 and 239.) See also Gintsburg, 1 Course 122, quoted *infra*, Chapter 6, note 55.

[83] E.g., Resolution of the Central Committee of the Communist Party of February 12, 1933: "The Central Committee of the Communist Party resolved: . . . (2) to condemn and repeal as contrary to the resolutions of the Central Committee of the Communist Party; (a) the Circular Letter of the R.S.F.S.R. Commissariat of Education of August 1918 . . . (b) the Resolution of the Board of the same Commissariat of March 28, 1930 . . ." (Pravda, February 13, 1933, No. 43). For other similar orders, see Rapoport, Das Zentralkomitee der kommunistischen Partei als Gesetzgebungsorgan der Sowjetunion, (1933) Zeitschrift für Ostrecht, Heft 2, 238–253.

[84] E.g., a Resolution of the Central-Asiatic Committee (Büreau) of the Communist Party of March 2, 1934, requesting the Central Committee of the Party in Uzbekistan (Turkestan) to reverse an obviously illegal Resolution of the Zelensk District Committee [local government body, V.G.] of September 19, 1933, concerning fines for nonattendance at school, cited in (1934) Socialist Legality No. 8, 21.

(2) Further, no important question is decided without directives of Party agencies. . .

(3) The Central Committee of the Party passes with the Council of the People's Commissars joint resolutions on the most important problems of government administration and similarly the provincial (regional) committees of the Party pass joint resolutions with the provincial (regional) executive committees of the soviets, which resolutions are binding upon the soviet and Party organizations;

(4) In the preparation of plans for work, the Party agencies give directive instructions. Plans affecting national economy are, as a rule, discussed at Party congresses whose decisions are carried out by the soviet agencies concerned;

(5) At all congresses, conventions and in all elective soviet organizations where there are not less than three Party members, Party groups are created. The task of the Party groups is "many-sided strengthening of the Party influence and carrying out its policy among persons who do not belong to the Party, fortifying of discipline in the Party and government service, fight against red tape, check on execution of the directives of the Party and the soviets" (*Statute of the Communist Party*, Section 70). Through these Party groups the control of the Party over the soviet mass organizations is effected. It is the duty of the Party groups to execute strictly and unswervingly the decisions of the directive Party agencies. The groups are subordinate to the corresponding local Party organizations; the Party group of the executive committee of a city is subordinate to the city committee of the Communist Party, the Party group of a district soviet is subordinate to the district committee of the Party, the Party group of a regional soviet is subordinate to the regional committee of the Party, etc.

(6) Members of the Party no matter how important their position with the government are under the control of the Party. Thereby the strictest necessary discipline of each and every member of the Party is secured.

(7) The Party checks up the work of the government agencies, corrects their errors, remedies the deficiencies and, if necessary, aids in carrying out the decisions. . . .

The Party organizations of a soviet institution, without exercising any control functions, must report to the competent Party agencies the deficiencies in the work of the institutions, take

notice of the defects in the work of the institution and its individual workers and communicate such kind of material with suggestions to the executive Party agencies and the chief of the institution.[85]

The role of the Communist Party in the soviet State as outlined in this quotation, is totally different from the role of a political party in a democratic country. The Communist Party appears as an essential, permanent element of the actual soviet government machinery. The party network is the framework of this machinery, holding tight its loose links. This explains why the unsettled and overlapping jurisdictions of the supreme government bodies do not obstruct the functioning of the whole system. The decisions are made on the party "top levels," which are fused with the corresponding levels of the soviet hierarchy, and are then promulgated in the form of an act of one or another official government body such as the Council of Ministers, Supreme Soviet, or its Presidium. None of these is, in itself, an authority, but merely an enforcement agency for decisions made on the very top level of the Communist Party. The functioning of the supreme party authorities, the Central Committee of the Party, its Politbureau, and the Secretary General, is not governed by any law. The Communist Party is the important and vital element of the soviet government machinery but lies outside the legal frame of the soviet system. It is a permanent extralegal element in the making of soviet laws and their enforcement. The problem of soviet jurisprudence arising out of this situation is discussed in Chapters 5 and 6. Here it suffices

[85] Studenikin, The Soviet Administrative Law (in Russian 1945) 7–9. See also Denisov (editor), Administrative Law (in Russian 1940) 74 *et seq.*

to stress the particular task performed by the Communist Party in the functioning of the soviet system.

5. Individual Ministries

Certain features of technical organization of the central government departments, the People's Commissariats, called since 1946 Ministries, may be also mentioned in this connection. Besides those departments in charge of such branches of administration as are common to all countries (foreign affairs, defense, finance, justice, etc.), a large number of ministries manage numerous branches of nationalized industry and commerce, e.g., the Ministry for Electric Power Plants, Fuel, Chemical Industries, Textile Industries, et cetera. In view of the narrow scope of their activities, they are bureaus rather than departments. The method by which they manage such branches of industries is discussed in Chapter 11. But within the central government, there are an Economic Council and several special business councils, having the status of committees attached to the Council of Ministers (formerly of People's Commissars) to direct the activities of a group of allied commissariats (ministries) charged with industrial management.[86]

It may also be mentioned that the functions of the Commissariat for Labor were in 1934 transferred to the Central Board of Trade-Unions,[87] but the Constitution does not include any representative of this Board in the

[86] The Economic Council was established by the Act of November 23, 1937, U.S.S.R. Laws, text 365. It consists of the Chairman of the Council of Ministers, his deputies, and the representative of the Central Board of the Trade-Unions. The act creating the business councils with personally appointed members was published only in Izvestiia, April 18, 1940, No. 90 (7162). Orders of such councils are mandatory on the Ministers, whose activities are thus co-ordinated.

[87] U.S.S.R. Laws 1933, text 238.

Council of People's Commissars (Ministers) at present. Such representative is, however, included in the Economic Council. Some of the People's Commissariats (Ministries) exist only in the federal government. Others are duplicated in the governments of the republics. There are also some to be found only on the republican level. This is, however, a mere technicality, because the purely federal ministries have their representatives in the council of ministers of the republics, and the purely republican ministries are under one or another federal office, e.g., the ministers of water economy of the Uzbek, Tadjik, Kazak, and Kirghiz republics are directly subordinate to the U.S.S.R. Minister of Agriculture.[88]

VI. Soviet Federalism

1. Union Soviet and the Soviet of Nationalities

The composition of the supreme federal body, the Supreme Soviet, reflects the peculiar characteristics of the soviet federal organization. Like the Executive Committee under the 1923 Constitution, the Supreme Soviet is a bicameral body, consisting of a Union Soviet and a Soviet (Council) of Nationalities (Section 33). Both houses have equal powers, and a law is considered adopted if passed by both houses in joint or separate sessions (Sections 37–39). The Union Soviet represents the citizens of the Union on the basis of one deputy

[88] According to the U.S.S.R. 1936 Constitution, Section 83, the council of ministers of a constituent republic consists of ministers of the republic and the representatives of the purely federal ministries (all-Union ministries).

Concerning the subordination of the ministries of water economy, see Denisov, *op. cit.* 45.

for every 300,000 people (Section 34), the total number for the elections in February, 1946, being fixed at 682.[89]

The Soviet of Nationalities is designed to represent the racial minorities of Soviet Russia. Each soviet state, or constituent republic (except the R.S.F.S.R., which is multiracial) was organized to represent a certain ethnological group, a racial minority. Moreover, there are, so to speak, substates within the states, autonomous republics, and autonomous regions, as well as some national districts, scattered like islands over the territory of the Union and each embracing an ethnological group.[90] To all of these territorial units, the use of the local language for all official purposes is secured. The Soviet of Nationalities is designed to afford them representation. Each constituent republic sends twenty-five representatives, each autonomous republic eleven, each autonomous region five, and each national district one (Section 35). The total number of representatives elected in the February, 1946, election is 657.[91] Thus, in the Soviet of Nationalities, not only all the constituent republics but also certain minor territorial units are represented. This privilege is granted only to the units embracing racial minorities—autonomous republics, autonomous regions, and national districts. For example, such important regions as Moscow or Leningrad have no direct representation in the Soviet of Nationalities, but the national district of an eskimo tribe, Nenets in the Far North, is represented.

89 Ananov, *loc. cit.*, note 39.
90 See *supra*, I, 1.
91 *Loc. cit.*, note 86.

2. Federalism in General

This type of representation in the supreme governmental body raises the question of the scope of self-government allowed to the states and minor territorial units within the soviet scheme. The question is far from simple. The establishment of precise criteria for a typical federal system is indeed beset with difficulties. Any federation is a compromise between sectionalism and complete national unity, a dynamic equilibrium of the centrifugal and centripetal forces in a given country, fixed more or less by constitutional law. It represents for the most part a transition from a unitary state to the independence of its component parts (e.g., the British Commonwealth after World War I) or, vice versa, from their former independence to their Union (e.g., the United States). Therefore, various degrees of independence of the states are to be found among the existing federations. Yet it may be said in a general way that there is no federation unless the states enjoy self-government and independence from the federal power to a considerable extent. Otherwise, they would not be states but merely administrative subdivisions, no matter what their official title. The following considerations may help to elucidate the problem.

We say that the power is *centralized* within a system of authorities if the higher (central) authority alone has the right of decision, or if its confirmation is required to make effective the decisions of the lower (local) authorities. On the contrary, the power is *decentralized* if the subordinate (local) authorities are the only ones competent to render a decision in certain matters. A special form of decentralization may be

distinguished,[92] namely, where the lower authorities may render decisions within certain limits but their decision may be reviewed and changed at the discretion of the higher authority, or the latter may proceed in the same case instead of the lower authorities. The term *deconcentrated power* was proposed by the late Professor Lazarevsky to indicate such a system.

Decentralization of power alone does not necessarily mean federalism. If the local authorities, though possessing broad power, are nevertheless mere agencies of the central government, we speak of *bureaucratic decentralization.* An example of such bureaucratic decentralization or deconcentration was the administrative scheme of the Russia of the end of the eighteenth and first quarter of the nineteenth centuries. The so-called governors-general, who administered entities embracing several provinces, and, to a degree, the governors of the individual provinces, enjoyed broad powers even including legislation, and yet they were appointees of the sovereign, before whose will no decision of theirs was final; and some of their orders were subject to repeal by other dignitaries of the crown. Here the power was deconcentrated within a bureaucratic hierarchy.

The antipode of the bureaucratic system of filling offices by appointment of the central power, and of a hierarchical subordination of authorities, is local *self-government.* It presupposes not only that offices in charge of local affairs decide many questions within an

[92] Moreau, F., Manuel de Droit Administratif (Paris 1909) 99 *passim;* Lazarevsky, 2 Lectures on Russian Constitutional Law (in Russian 1910) 28 *passim.*

The criteria of a federal state set forth on the following pages are very close to the masterly discussion by Hans Kelsen, Oesterreichisches Staatsrecht (1923) 165.

established jurisdiction of their own, but also that offices are filled in one way or another by the local inhabitants and stand outside the hierarchy of agencies of the central government. In other words, independence of local officers from the central government is a part of local self-government.

Local self-government presupposes also that the local units possess their own authority to tax and to appropriate.

The self-government of a territorial unit may be restricted to the discharge of current administrative matters, or it may include the power of solving more general problems of a legislative nature. In the latter case, we call it *autonomy*. *Federalism* means the broadest possible autonomy of the component parts compatible with their unity especially as concerns foreign relations. It presupposes certain traces of sovereignty in the states in the form of their constituent power (i.e., the right of self-organization), furthermore, their own final jurisdiction, and a well-defined share in the formation of at least some of the agencies of federal power.

3. Soviet Federalism Analyzed

The soviet states and certain of the minor units unquestionably meet the last requirement in view of their representation on the Council of Nationalities. Moreover, the term sovereignty is used with regard to the constituent republics in the 1923 Constitution, Section 3, and in the 1936 Constitution, Section 15. Both Constitutions (Sections 4 and 17 respectively) mention their free right of withdrawal from the Union. Since the constitutional amendment of February 1, 1944, each constituent republic "has the right to enter into direct

relations with foreign countries, to conclude agreements with them, and to exchange diplomatic and consular representatives with them" (Section 18*a*). To the federal government, however, is reserved "the representation of the Union in international relations, the conclusion and ratification of treaties with other countries, and the establishment of general procedure for the mutual relations between the constituent republics and foreign countries." In fact, the conceivably far-reaching consequences of these provisions are curtailed by the entire organization of governmental machinery, both federal and state.

In contrast to the United States, the state authorities perform the functions of local agencies of the federal government and are subordinate to it. Federal and state legislative, executive, and judicial authorities are united in one hierarchy, and states do not have any independent jurisdiction firmly protected from interference by the federal government. Federal law prevails over state law (Section 19), and an order by a federal officer is mandatory upon a state officer acting in the same branch of administration, even if he is appointed by the state or other local authority (Section 101). The federal government is for all purposes the central government, and the state government is for all purposes the local government. Although the federal government is defined in Section 15 of the Constitution as one having enumerated powers, these powers are enumerated in the twenty-three subsections of Section 14 of the 1936 Constitution in such broad terms as to leave very little room for independent state jurisdiction.[93] The

[93] Section 14 of the 1936 Constitution enumerates the federal powers as extending over the following subjects:

federal government is in complete control of the state budgets and the budgets of smaller local units, and it assigns to these the sources of revenues and taxes (Section 14(k)).[94]

Lenin and other founders of the Soviet Union built

(a) Representation of the Union in international relations, making and ratification of treaties with other states, establishment of the general procedure in the mutual relations between the constituent republics of the Union and foreign countries;

(b) Questions of war and peace;

(c) Admission of new republics into the U.S.S.R.;

(d) Control over the observance of the Constitution of the U.S.S.R. and ensuring conformity of the constitutions of the constituent republics of the Union with the Constitution of the U.S.S.R.;

(e) Confirmation of alterations of boundaries between constituent republics of the Union;

(f) Confirmation of the formation of new provinces and regions and also of new autonomous republics within constituent republics of the Union;

(g) Organization of the defense of the U.S.S.R., the commanding of all the armed forces of the U.S.S.R., establishment of the directing principles of the organization of military units of the constituent republics of the Union;

(h) Foreign trade on the basis of government monopoly;

(i) Safeguarding the security of the State;

(j) Establishment of the national economic plans of the U.S.S.R.;

(k) Approval of the single government budget of the U.S.S.R., as well as of the taxes and revenues which go to the budget of the Union, to the budgets of the republics and to local budgets;

(l) Administration of the banks, industrial and agricultural establishments and enterprises and trading enterprises of unionwide importance;

(m) Administration of transport and communications;

(n) Direction of the monetary and credit system;

(o) Organization of state insurance;

(p) Raising and granting of loans;

(q) Establishment of the basic principles for the use of land as well as for the use of natural deposits, forests, and waters;

(r) Establishment of the basic principles in the spheres of education and public health;

(s) Organization of a uniform system of national economic statistics;

(t) Establishment of the principles of labor legislation;

(u) Legislation on the judicial system and judicial procedure; criminal and civil codes;

(v) Laws on citizenship of the Union; laws on the rights of foreigners;

(w) Issuing of unionwide acts of amnesty.

[94] See *supra*, note 93. Beginning with the village soviet, budgets of any soviet territorial unit require the approval of the next higher unit. Re village soviets, see R.S.F.S.R. Laws 1931, text 142, Section 14. Re cities, *id.* 1928, text 503, Section 64; *id.*, text 544, Section 8.

up the soviet government machinery on the basis of the principle of "voluntary centralism," "democratic centralism," or "proletarian centralism," as they termed it.[95] By virtue of this principle, unrestricted power is given to the authorities of each larger territorial unit to repeal any act of the authorities of the smaller territorial units within its geographical limits. The principle is applied equally to the units called constituent or autonomous republics or autonomous regions, as well as to the units which by name are mere administrative subdivisions, such as regions (*oblast, kray*) or districts (rayon, okrug). It was fully expressed in the 1923 Constitution [96] and in separate statutes concerning local

[95] Lenin, The State and Revolution (English ed. 1919) 56; Gurvich, The Soviet Constitutional Law (in Russian 5th ed. 1926) 148; *id.*, "The Principle of Federalism and Autonomy in the Soviet System" (in Russian 1924) Soviet Law No. 3, 29. The recent textbooks on administrative law explain the democratic centralism as follows:

The soviet government machinery is a centralized machinery. The unity of the machinery of the soviet government administration is an expression of the unity of the will and action of the working class and the whole of the soviet nation. . . . Democratic centralism is expressed in the exercise by the soviet state of the unity of political and economic direction. . . .

The essence of democratic centralism . . . consists of special forms of continuous and systematic control over lower agencies by higher agencies, forms which are peculiar to the soviet system and the reverse of "control from below" over the organs of administration, the control by the masses themselves. Denisov (editor), Administrative Law (1940) 29, 30, 31.

However, while for the control from above several strong devices are established, the soviet jurists fail to indicate any device of control available to the masses.

The other textbook states as follows:

Bolsheviks are centralists by conviction. Centralization is necessary for the achievement of the aims and purposes of the soviet government administration; its necessity is conditioned upon the fact that (1) the U.S.S.R. is in capitalist surroundings, wherefore it is necessary to unite all the forces of the country—which is possible only on the basis of centralism; (2) it is necessary to utilize all the resources of the country for the building up of a new society according to one nationwide centralized plan; (3) the bolsheviks put the unity of class interests above the isolationism of individual nationalities. . . . Studenikin, Administrative Law (1945) 17.

[96] The 1923 Constitution stated definitely that the supreme federal authorities (Congress, the executive committees, and the Presidium) have the right to annul resolutions of the republican congresses and executive committees if they violate the federal Constitution (U.S.S.R. Constitution, Section 2, *v.*).

government. These statutes distinctly provide that local officers who are supposed to be elected by the local population or appointed by local authorities are nevertheless completely subordinate, in the discharge of their duties, to the officers of the next higher territorial unit active in the same branch of government.[97] The soviet theorists term this the principle of dual subordination of all the soviet public servants.[98] Both principles are still in evidence in the 1936 Constitution.

Yet it was also stated without reference to constitutionality that the federal executive committee had the power to repeal at its discretion any resolution, decree, etc., "of the congresses of soviets of the constituent republics, their executive committees, and of any other authorities within the area of the Union" (*id.*, Section 20; R.S.F.S.R. Constitution 1925, Sections 17(j), 45). A similar right was given to the federal Presidium (*id.*, Section 31). However, any repeal of resolutions of the congresses of the constituent republics required a subsequent confirmation by the federal executive committee (*id.*, Section 32).

The decrees of the federal Council of People's Commissars possessed "a binding force on the whole of the territory of the Union" (*id.*, Section 38), and the republican authorities might merely appeal against them to the federal Presidium "without suspending their execution" (*id.*, Section 42). The final decision belonged in such case to the federal executive committee (*id.*, Section 32).

[97] The following provisions are of special importance because they are still effective under the new Constitution according to: 1 Civil Law (1944) 159; Zimeleva, Civil Law (1945) 33; Statute on Regional and District Soviets. R.S.F.S.R. Laws 1928, text 503, Section 20(c), 29–31; Statute on District Congresses of Soviets, *id.* 1931, text 143, Sections 13(b), 46, 50, 52, and *id.* 1930, text 545, Section 14(b); Statute on Village Soviets, *id.* 1931, text 142, Section 5; Statutes Regulating the Autonomous Regions and Republics Included in the Regions, *id.* 1928, text 544, Sections 8–11; text 889, Sections 5–9; Statute on the Regional and City Offices of Municipal Economy of June 9, 1939, *id.* 1940, text 2, Section 2.

[98] Studenikin, *op. cit.*, defines this principle as follows:

"Dual" *subordination* of authorities in the soviet administration is the concrete expression of the principle of democratic centralism. The "dual" subordination means that a local administrative agency is subordinated along two lines, both to the local organ of authority and to the next higher organ of a special branch of administration. For example, a district tax collector's office is simultaneously subordinate both to the district executive committee and to the tax collector's office of the region. (p. 18)

Dual subordination thus secures: 1) the full power of the local soviets over such departments of their executive committees as are subordinate to them; 2) a centralized administration for the purpose of carrying out nationwide tasks in the interests of the country as a whole and the local interests as well.

The principle of democratic centralism requires: 1) continuous control

Thus, the federal Presidium may repeal the resolutions of the councils of ministers of the constituent republics if they do not conform to law (Section 49(f)). The federal Council of Ministers has the right to suspend decisions and orders of the councils of ministers of the constituent republics in all branches of administration and national economy pertaining to federal powers, and these are very broad (see *supra*). The Ministers direct the branches of government administration entrusted to them throughout the territory of the Soviet Union either directly or through the corresponding ministers of each constituent republic (Sections 75, 76). The councils of ministers of the constituent republics issue acts in pursuance of federal laws and those of the republic and in pursuance of "the decisions and orders of the U.S.S.R. Council of People's Commissars, and supervise their enforcement" (Section 81). The council of ministers of a constituent republic has the right to suspend the acts of the councils of ministers of the autonomous republics and to repeal outright the acts of executive committees of the autonomous regions and provinces (Section 82). The ministers are doubly subordinate, viz., both to the council of ministers of their own republic and to the appropriate federal Minister and other federal authorities (Sections 85, 87). The executive agencies of the smaller territorial units, regions, districts, cities, and villages are again in double subordination: they "are directly accountable to the (local) soviet which elected them and to the executive agency of the superior soviet" (Section

over the lower organs or administration; 2) subordination of the lower organs of administration to the higher organs; 3) firm observance of the discipline of the plan and execution of planned assignments issued by the higher organs; 4) systematic drawing of the toilers into daily participation in the government administration; 5) exercise of a concrete, operative, and differentiated direction of the lower organs. (p. 19)

101). Where there is conflict between the two, subordination to the agency of a higher unit prevails. It is significant that the federal Constitution does not provide for any control of constitutionality of laws, nor does it establish any procedure by which the states may protect their rights in case of conflict with the federal government.

All the foregoing leads to the conclusion that soviet federalism is in fact a system of deconcentrated government power within the meaning of this term as defined above. As a soviet writer correctly stated, the soviet republics would not "pass the examination" for the rank of federal states, if the yardstick of a well-defined, independent jurisdiction were applied.[99] The use of the local language and the right to representation in the Soviet of Nationalities seem to be the only essential rights of a soviet state, a constituent republic, or of a substate, an autonomous republic or region.

In summarizing this survey of the concessions made to Western democracy with the enactment of the 1936 Constitution, it may be stated that essentially the soviet regime has retained the particular characteristics of its governmental machinery and functioning.

[99] Gurvich, *op. cit.* 144 *passim.*

Chapter 3

Present Order: Economic

I. General Characteristics

1. Socialism Achieved as Defined in the 1936 Constitution

The social order thus far achieved in Russia is officially designated in the 1936 Constitution as socialism, the first stage of communism. The essential characteristics of this order are outlined in the provisions of the Constitution as follows: "The economic foundation of the U.S.S.R.," states the Constitution, "consists in the socialist system of economy and socialist ownership of the instruments and means of production . . . [and] the abolition of private ownership of the instruments and means of production . . ." (Section 4). Government ownership is extended not only, as under the Civil Code of 1922, to "land, subsoil, water, and forest," but also to "mills, factories, mines, railways, water and air transport, banks, means of communication . . . public utilities, and essential housing in cities and industrial centers" (Section 6). Private industry is admitted only in the form of small-scale handicraft and midget farming, conducted without the employment of hired labor (Sections 9 and 7). All productive investment is thus barred. Moreover, the Constitution expressly offers only a limited protection to private ownership. Such protection is not promised to "private" ownership, but to "personal" ownership, and again it is extended only to personal ownership in

specifically enumerated categories of objects, viz., "earned income and savings, dwellings, auxiliary household economy, household effects and utensils, objects of personal consumption and comfort" (Section 10). The soviet jurists now interpret this clause to the effect that protection by law is limited to private ownership of commodities for consumption only.[1]

This sounds like a return to the concepts of Militant Communism. But the present social order, officially termed socialism, has new features making it different from both Militant Communism and the New Economic Policy.

2. Substitutes for Profit Motive: Economic Inequality

Unlike the situation under the New Economic Policy, private enterprise is now completely banished from economic life, but in contrast to Militant Communism, an outlet for personal ambition is given in the system of socialist economy in order to make the system work. Whereas private vested interests and private initiative are excluded from the production and distribution of commodities, inequalities in their distribution are recognized in principle and protected by law. The officially announced principle is, "From each according to his ability, to each according to his work" (Constitution, Section 12).

In June, 1931, Stalin emphasized that differentiation of wages is an inevitable principle of socialist industry.[2]

[1] 1 Civil Law Textbook (1938) 229. See Chapter 16.

[2] Stalin, Problems of Leninism (Russian 10th ed. 1935) 451. An important revision of the Marxian economic theory, and of the doctrine of so-called surplus value, was inaugurated by a program for the teaching of national economy, "Some Problems of the Teaching of National Economy" (in Russian 1943) Under the Banner of Marxism, No. 7/8, 56–78. It was widely discussed in the American press; see Landauer's discussion (1944) The American Economic Review, June; Dunaevskaia,

At the Seventeenth Congress of the Communist Party (1934), he stated:

> Equalization in the sphere of demands and personal life is reactionary, petty bourgeois nonsense, worthy of a primitive ascetic sect and not of a socialist society organized in a Marxian way.[3]

Consequently, economic inequality is fully admitted in Soviet Russia, although its reasons are not altogether identical with those of other countries. Profit making is barred in that no private, independent business is tolerated, and the prospective earnings of the bulk of the population are practically limited to wages and salaries; but the governmental scale of wages and salaries, whether in money or comfort, aims to offer a substitute for profit making to stimulate the efficiency of work. A system of wages and salaries is designed to allow wide room for inequality in earnings. To this end, the principles of piecework and bonuses for efficiency without any guaranteed minimum wage constitute the basis of compensation for work in governmental industry and commerce, in collective farming, and in co-operatives. Normal pay requires the attainment by the employee of a standard of output established by the management (see *infra* p. 807).

With regard to industry and commerce, the Labor Code, as amended in 1934, includes the following provisions:

> 57. If an employee of a governmental, public, or co-operative enterprise, institution, or business fails through his own fault

"Revision of Marxian Economics" *id.*, September; Baran, "Trends in Russian Economic Thinking" *id.*, December; also New York Times, April 2, 13 and October 8, 1944. An English translation of the article itself by Kazakevich appeared as a separate pamphlet under the title, Political Economy in the Soviet Union, Some Problems of the Teaching of the Subject (New York International Publishers 1944).

[3] *Id.* 583 *passim.*

to attain the standard of output prescribed for him, he shall be paid according to the quantity and quality of his output, but shall not be guaranteed any minimum wage. In other enterprises and businesses (private enterprises, including those under a concession), such an employee shall be paid not less than two-thirds of his scheduled rate.

If failure to attain the standard has not occurred through the fault of the employee, he shall in any case receive not less than two-thirds of his scheduled rate.

If an employee persistently fails to attain the standard under normal working conditions, he may be dismissed in accordance with Section 47, or transferred to other work.[4]

An elaborate scale of wages based on piece rates establishes differentiation depending not only upon the nature of the job, but also upon the efficiency of the employee. Thus, in 1936, in various branches of industry laborers were divided into from five to fifteen classes, according to their normal wage rates.[5] Correspondingly, provision is made for various deductions from and additions to the basic amount of wages or salary. Numerous honorary titles and medals carry with them distinct material benefit such as tax exemption, right to extra housing space, pensions, free travel on street cars and railroads, et cetera.[6]

The soviet law provides also for personal salaries and personal pensions awarded totally without reference to any scale.[7] Inventions and suggestions for technical

[4] As amended, R.S.F.S.R. Laws 1934, text 146. For text of Section 47, see Chapter 22, p. 801, note 36.

[5] Grishin, Labor Law (in Russian 1936) 178. See also U.S.S.R. Laws 1938, text 214; *id.* 1939, text 119; Soviet Labor Law Textbook (in Russian 1939) 129 *et seq.*

[6] Statute on Heroes of Labor of July 21, 1927, U.S.S.R. Laws 1927, text 456 (amended *id.* 1930, text 1; *id.* 1931, text 118); Aleksanrov and Genkin, Soviet Labor Law (in Russian 1946) 291, also Edict of September 16, 1947, Vedomosti 1947, No. 33; General Statute on Decorations of the U.S.S.R. of May 7, 1936, U.S.S.R. Laws 1936, text 220*b*; Statute on the Title "Hero" of the U.S.S.R., *id.* 1936, text 357*b*; R.S.F.S.R. Laws 1927, text 720; *id.* 1936, text 88. Some benefits were repealed, September 10, 1947, Vedomosti No. 41.

[7] For personal salaries, see U.S.S.R. Laws 1938, text 229, which repealed

improvements are encouraged by issuance of "certificates of authorship" instead of patents. In contrast to a patent, the certificate of authorship vests the monopoly for the use of the invention or improvement in the State but grants the author the right to remuneration according to a schedule. Its amount depends upon the amount of saving obtained through the utilization of the invention or improvement.[8] Remuneration up to 10,000 rubles is exempt from income tax. Special Stalin Prizes, amounting to as much as 300,000 rubles each in a lump sum, are annually distributed among managers, artists, writers, and scientists in various fields.[9] These prizes are also exempt from income tax. In 1944, over 1,000 persons received such prizes.[10]

All this affords managing and professional staffs and skilled labor remuneration in money and comfort greatly exceeding that given to the ordinary laborer. While a laborer received in 1937 some 115 rubles a month, an engineer was paid 1,500 rubles a month.[11] There are not only differences in wages between the various industries, but also between individual enterprises of the same industry, and between jobs within the same establishment.

3. System of Management in Industry

Each governmental enterprise or establishment engaged in business constitutes an independent economic

a similar act, *id.* 1930, text 186. For pensions, see Act of April 17, 1946, R.S.F.S.R. Laws 1946, text 21. This act replaced several previous acts, see Chapter 22, Labor Law, III.

[8] See Chapter 16, V, and Volume II, Nos. 25, 26.

[9] U.S.S.R. Laws 1940, texts 6, 89, 207; *id.* 1942, texts 2, 56; *id.* 1943, texts 72–74.

[10] *Id.* 1946, texts 31, 32, 160–162; *id.* 1947, text 6.

[11] Law on minimum rates, U.S.S.R. Laws 1937, text 340; (1937) 16 Soviet Justice No. 2, 16, 17.

unit, a legal entity (Civil Code, Sections 13, 19, 22). These units operate on "a commercial basis" (*khozi-astvennyi raschet*), that is to say, a specified amount of government capital is individually assigned to each of them under a charter. Each such unit, called "trust" in industry and *torg* in commerce, must produce profit with this capital in keeping with the established standards of output, or at least be self-supporting, unless otherwise planned by the government in creating the unit. Those operating on a commercial basis enjoy a degree of independence and enter into contracts with each other and with private persons. Though they are governmental agencies, these units are expected to act with the competitive vigor of a private enterprise (principle of "socialist competition"). In addition to various honorary distinctions for individual enterprises, such as titles and banners, the motive of personal profit stimulates this competition. Various additions to the basic pay of all employees are distributed in the form of bonuses and extra comforts, depending upon the commercial efficiency of the whole enterprise (principle of "check by ruble"). At the head of each "trust" or *torg*, or of any branch, is an appointed director, a personally responsible executive. A certain percentage of the profit or savings attained by the enterprise constitutes a special director's fund and is used for bonuses given to individual employees under his management.[12] Thus the actual pay received by an executive or a laborer depends not only upon his personal efficiency but also, to an extent, upon the success of the establishment employing him.

On the other hand, the competition between individual

[12] See pp. 387, 810–811 and Volume II, Nos. 14–17.

enterprises, their initiative and mutual transactions, must fit the general economic plan and the planned assignment given to each establishment.[13] Likewise, the total expenditures for wages in an establishment must not exceed the so-called wages' fund as defined for it by a central government bureau.[14] The State Bank, which keeps the accounts of all the enterprises, supervises the observance of this rule.[15] An intricate system of accounting and reporting to various authorities is established, but, judging from the findings of the Ministry of State Control in June, 1946, fails to prevent falsification of production figures and illegal distribution of bonuses.[16]

Inefficiency involves not only loss of material benefits and possible loss of job, but prosecution in court as well. A series of laws penalize inefficient management, poor quality or small volume of output, mass or systematic sale of goods of poor quality from government stores, failure to maintain the established standards, failure to discharge workers for absenteeism, and other violations of labor discipline. Workers are subject to disciplinary penalties for "loafing on the job," to punishment in court for absenteeism, and to deductions from wages in case of damage to or loss of property, tools, et cetera, caused by negligence.[17] Liability for absenteeism, tardiness, and other violations of labor discipline is constantly in-

[13] See Chapters 11 and 12.

[14] U.S.S.R. Laws 1933, texts 75; *id.* 1935, text 208; *id.* 1938, text 51; *id.* 1939, texts 395, 396.

[15] *Id.*, also 1935, text 286.

[16] These findings were printed in various Moscow newspapers on June 26, 1946, and were reported by Drew Middleton in the New York Times, June 27, 1946.

[17] Labor Code, Sections 83 *et seq.*, as amended in 1932. See Chapter 22, pp. 816–825.

creasing.[18] Freezing on the job and compulsory transfer of employees were introduced in 1940 before the Soviet Union was attacked by Hitler and seem to remain a feature of the postwar soviet labor regime.[19]

Also, there is one feature of the new order which makes the whole setting somewhat different from that of Militant Communism. Government property under Militant Communism was actually established only by confiscation. Government industry consisted in fact of establishments created by private capitalists and merely taken over by the government. But through the efforts and sacrifices made since the inauguration of the Five-Year Plan, many new establishments have been created, exceeding the old by nine times in 1933,[20] and the old have been in many instances re-equipped or greatly enlarged. Thus, the majority of industrial and commercial establishments now in operation in Soviet Russia are not only government-owned but also government-created. As a consequence, beginning with the Five-Year Plan, the problem of management of government business activities has not been the problem of readjusting a formerly private apparatus, but the problem of creating a new governmental one.

[18] U.S.S.R. Laws 1933, text 442; *id.* 1934, text 325; R.S.F.S.R. Laws 1931, text 162; U.S.S.R. Laws 1939, text 1; Joint Interpretation of the Law Cited "Decree by Council of People's Commissars" (1939) Soviet Justice No. 2, 3. See also "Schedule of Disciplinary Punishments of December 17, 1930, No. 369, for Governmental Enterprises" (1930) News of the Commissariat for Labor (in Russian) No. 36; Disciplinary Code for Workers of Liaison (post, radio, telegraph), U.S.S.R. Laws 1939, text 487, Sections 14 *et seq.*; Edict of the Presidium of June 26, 1940, Section 5, Vedomosti 1940, No. 20; Standard Rules for Internal Organization for Employees of Governmental, Co-operative, and Public Establishments and Offices of January 18, 1941, U.S.S.R. Laws 1941, text 63, translated in Vol. II, No. 40, discussed *infra*, p. 818.

[19] See Chapter 22, p. 828 *et seq.*

[20] Stalin, Problems of Leninism (English ed. 1940) 632.

4. Soviet Commerce

Commerce no less than industry is now conducted on new principles. In contrast to the free trade under the New Economic Policy, the present "soviet commerce" is, in Stalin's words, "a commerce without capitalists, big or small." According to him, the soviets "eliminated private traders, merchants, and middlemen of any kind." [21] Since the Law of May 20, 1932, "the opening of shops or stands by private merchants shall not be permitted." [22] Moreover, a crime was introduced into the Criminal Code in 1932 termed "speculation" and defined as "the buying up or reselling for profit (speculation) of agricultural products or commodity staples," entailing not less than five years' imprisonment.[23] The law penalizes the mere fact of buying up or reselling for profit, even if the profit is reasonable and does not violate any fixed price. Yet, contrary to the practice of Militant Communism under which the government had the exclusive right to buy and sell, or rather to distribute commodities, the legitimate producer himself, primarily the collective farmer, may sell his products on the open market, but only directly to the consumer. Small craftsmen (shoemakers, tailors) may exercise their trade, making footwear or clothing for definite customers, from their own or the customers' material, but are not permitted to "manufacture from their own material ready-made articles . . . for sale on the market." [24] Again, the government does not distribute commodities free of charge, as it tried to do under Mili-

[21] Speech of January 7, 1933, Stalin, *op. cit.*, note 2 at 505.
[22] U.S.S.R. Laws 1932, text 233.
[23] *Id.*, text 375; R.S.F.S.R. Laws 1932, text 385, incorporated into the R.S.F.S.R. Criminal Code as Section 107.
[24] See Instruction quoted in Chapter 9, p. 350.

tant Communism, but buys and sells, keeping a variety of stores operating "on a commercial basis" and offering the public a variety of goods at diversified prices. Efficiency in operating a store is reflected in the wages of all its employees, as is the case in industrial establishments.

Trade in agricultural products differs both from the Militant Communism and New Economic Policy practices. The tax in money levied on farming is insignificant. The government collects agricultural products in kind. It is neither the individual farmers nor the *mir*, aggregate of individual farmers, that delivers the products to the government. It is the collective farm, where all work is done collectively and the income is collectively obtained and distributed. The collective farms and farmers have the right to sell on the open market the surpluses of products left after delivery of the quota assigned to the government.[25] But again, no private trader is allowed on the market. Agricultural products may be sold only by the producer directly to the consumer (see *supra*).

II. Land Tenure

1. Agricultural Land

(a) *Collective farms.* The collective farms have taken the place of scattered family farmsteads of the New Economic Policy period. The collective farms included in 1936 about 98 per cent of the arable land and embraced 90.5 per cent of farming households.[26] The tracts of land held under the New Economic Policy by individual farming families and the bulk of their im-

[25] U.S.S.R. Laws 1932, texts 190, 233, 375; *id.* 1933, texts 25, 396. See Chapter 20.

[26] See Tables, Chapter 19, note 90.

plements and livestock were pooled during the drive for collectivization from 1929 through 1933.[27] The title to hold the land thus obtained was recognized as belonging to each collective farm as an entity. Land assigned to each collective farm in "toil tenure," though remaining in governmental ownership, was declared to have been granted to each farm "without any limit of time, that is, forever." A certified deed was issued to each collective farm for the acreage so granted.[28] But the collective farm may not dispose of it, i.e., mortgage, barter or even rent it. Nor can a member who originally contributed his tract withdraw it. Voluntary withdrawal or expulsion of a member does not authorize him to claim his share of the land.

Farming and animal husbandry are carried on collectively under the direction of a chairman and board of managers elected by the members, and brigadiers (foremen) appointed by the management. From the collectively obtained produce, obligatory deliveries of various products to the government are made in kind, such as cereals, meat, fats, milk and other dairy products, wool, etc. The amount of each product is assessed by the government as a tax in kind in proportion to the acreage of the farm and not the yield or the number of livestock.

Governmental control over the collective farms is exercised through the machine-tractor stations, each supervising and serving several farms. These stations, being outright government agencies, are depots for all the more or less complex agricultural machinery, such as tractors and combines, and they alone may possess

[27] The details of the transformation are discussed in Chapters 19 and 20. where all the references are given.

[28] U.S.S.R. Laws 1932, text 388; Standard Charter of Agricultural Artel. 1935, Section 2, see Vol. II, No. 30; U.S.S.R. Constitution 1936, Section 8.

motorized threshing machinery. In their hands, all the power resources of mechanized agriculture are concentrated. But the work with the machines of the station is performed by the collective farmers themselves under the guidance of technical personnel of the station. The purpose of the machine-tractor stations, as defined by law, is to be "not only the centers directing the technique of agricultural operations, but also political centers directing the organization of and influence upon the broad masses of collective farmers."[29] They are also the collectors for the government from the collective farms of compulsory deliveries of agricultural products. A part of the products is also collected for the services of the tractor stations themselves. Each collective farm makes a contract annually with the machine-tractor station according to standard terms established by law. This contract determines the amount of products to be delivered to the government in compensation for the services of the station. The terms of the contract include also the major farming operations which the collective farm must undertake in fulfillment of the plan assigned to each farm by the government (e.g., fixing the size of the area to be sown). The station supervises the execution of the terms of the contract. First, deliveries to the government, as well as compensation for the services of the machine-tractor station, are deducted from the produce of the farm, then certain supplies are laid aside, and the rest is sold on the open market or distributed among the members.

The collectively obtained income, in money and produce, is divided among the individual members in accordance with their contribution in labor to the collective work during the fiscal year. Each member

[29] Law of January 30, 1933, U.S.S.R. Laws 1933, text 41.

must obtain credit for a minimum of labor established by law, depending upon the region and the kind of farming. Those who fail to attain the required minimum without a justifiable reason are expelled and punished in court. Credit for contributions of labor is computed by a unit called a "labor day" (*Trudoden*). A schedule established by the government classifies all the farming jobs according to the skill and effort required for their performance and the results obtained. For a full working day spent on the job, a certain number of labor days or a fraction of a labor day is credited to the member. The law provides also for various additions for extra efficiency and for deductions for inefficiency. For one day's work a tractor driver may be credited with as many as four or six labor days, while a shepherd may not earn more than one half day. The collectively obtained income of the whole collective farm is divided by the total number of labor days credited to all its members. The result indicates the amount of produce or money to be paid for each labor day credited to each member.

Each collective farm is subdivided into gangs (called brigades) with land, implements, or animals assigned for a period of several years. Each brigade, and especially its foreman (brigadier) is awarded a bonus if the brigade excels others in efficiency; on the other hand, the credit of the brigade calculated in labor days may be reduced if it fails to achieve the average of other brigades.

In a collective farm, collective farming is combined with the farming of individual families. Every household in a collective farm has assigned to it a small house-and-garden plot of land (not over 2.47 acres). The exact size of the plot depends upon the region. The

house, implements, poultry, a limited amount of livestock (1 cow, 2 calves, 1 hog, 10 sheep), and the products of the family farming are in the undivided joint ownership of the household, (similar to the joint ownership of an independent one-family farm). See *infra*, (b). Thus a collective farmer has a dual status. As a member of the collective farm he receives remuneration for personal labor contributed to the collective work of the entire farm. This is his share in the collectively obtained profit, and whatever he receives under this title is in his separate personal ownership. But whatever he contributes to the husbandry of the household is merged in the undivided joint ownership of all members of the household.

Thus, the organization of the collective farms aims to reconcile the primary duty of a member to perform collective work with the persistent human desire to hold something in private ownership. Within the new collective farming, an old-fashioned family farming continues to exist. But, while admitting private farming within these rigid limits, the soviet laws emphasize that private farming must be only auxiliary or secondary to collective farming, although the soviet leaders admit that this is not the idea of many farmers.[30] The relations between collective farming and the private farming within it, are far from settled (see Chapters 20, 21).

(b) *Independent farming*.[31] Land tenure of the farming families which did not join any collective farm is regulated only to a limited extent by the laws under which their tenure came into being (1922–1929) and which guaranteed a tenure without limitation of time. Since 1939, the acreage of an independent farm must

[30] See Chapter 21.
[31] For details and references see Chapters 19, 20, 21.

not exceed 2.47 acres per family. All taxes in money and in kind are levied on these farms at a higher rate than those established for the collective farms. A special progressive tax is paid for each horse owned by the independent farmer. The land used by the farm cannot be sold, mortgaged, or otherwise conveyed by a private transaction *inter vivos* nor by will. Its tenure remains with the household as a whole as long as the household exists and may be terminated only by abandonment or by a decree of the public authorities. All property appertaining to the farm (house, implements, livestock, produce) is in the undivided joint ownership of all members of the immediate family and relatives or strangers working under the same roof. The head of the household is trustee of the property of the household.

(c) *Sovkhozi.* Agricultural land exploited by the government itself is distributed among the so-called soviet farms (*Sovkhoz*), which are outright government enterprises. (See *infra*, pp. 707–708.)

2. Houses in the Urban Settlements

(a) *Privately owned houses.*[32] Not all prerevolutionary housing was nationalized in the Soviet Union. Private ownership of land in the cities was abolished in 1918, and the city governments in centers of 10,000 inhabitants and over were authorized to expropriate houses exceeding in value a certain amount, to be fixed by the local government of each town or city. Later, some of the smaller buildings were denationalized, and those which were to remain in private ownership were to be registered with the municipal government of the

[32] For details and references see Chapter 8, IV, 1.

place where the house is located. To be legalized, private ownership of such small residential houses must be registered in accordance with a series of decrees. Legalization is granted to the original owners or their lawful successors. The land itself belongs to the government, but the rightful owner of the house may sell, mortgage, and devise it. Ownership of such houses devolves in testate and intestate succession like other property. Sales of and contracts to sell residential houses are permitted, provided that, after sale, the purchaser, his spouse, and minor children together still do not own more than one house and that the seller does not make more than one sale within three years. Conveyance of a house must be notarized and recorded with the municipal government. See Chapter 8, IV.

(b) *Building tenancy.*[33] A soviet citizen may, under a contract with the city government, obtain a lot for the erection of a residential house. He may use and dispose of the house and lot within a period of time specified by contract: not over 65 years for stone and brick buildings, and not over 50 years for wooden structures. Under the same title, a dilapidated or unfinished house may also be released by the city government. Upon the expiration of the term, the lot with the house is to be surrendered to the city government. But within the term specified, the person enjoying the building tenancy may use and dispose of the house, viz., sell, mortgage, and bequeath it freely as well as exclude any intruder.

III. Recent Trends

A survey of the elements of the social order achieved in the Soviet Union shows how little its essential fea-

[33] For details and references see Chapter 16, II, and Sections 71 *et seq.* of the Civil Code. For their translation see Volume II, No. 2.

tures may be explained by attaching to it a label like "socialism, a transitional stage to communism," as do the soviet leaders, or "state capitalism" or "economic bureaucracy," as do the opponents from the capitalist or socialist camps. Taken as a whole, it has no precedents. Nor does it fit exactly any anticipations of socialists, Marxians, or non-Marxians which antedate the Russian Revolution. Marxism remains the official philosophy of the soviet leaders, yet the present order has features which would have been condemned in the earlier stages of the soviet regime as incompatible with this philosophy. When broken down into its component elements, the soviet system reveals at present, along with its completely novel features, many elements characteristic of prerevolutionary Russia, the capitalist world, and Western democracy. Certain elements of the old order have shown a tendency to increase in number and importance during the last ten years. However, the soviet theorists visualize these elements blended with the new as a coherent whole.

In contradistinction to their candid recognition, in the days of the New Economic Policy, of the contradictory nature of their law and social structure,[34] the soviet leaders at the present time seek to reconcile the existence of one or another traditional institution with the basic principles of their original program and philosophy. These principles are asserted as firmly as ever, but a new interpretation is given to them in order to admit new practices. The now discontinued practices and condemned theories are viewed as involuntary or, more often, malicious misconstructions, which at present should be and are being corrected. The traditional in-

[34] E.g., Stuchka, (see Chapter 5). Malitsky, quoted in Chapter 6, p. 222.

stitutions now reinstated, such as ownership, inheritance, the family, and universal suffrage, bear old names, the soviet writers say, but in a new context have different natures, serve purposes other than those which they serve in the capitalist world, and in fact are true socialist institutions—socialist ownership, socialist inheritance, the socialist family, and the like, as they exist in the Soviet Union. A few examples may illustrate this development. Stuchka, at one time the foremost soviet authority on private law, stated in 1929: "Sale and purchase will never become socialist. . . . Sale and purchase are capitalist institutions and socialism does not recognize any sale and purchase. It recognizes only direct supply." [35] In 1937, this point of view was considered a basic error, and, in fact, the entire system of supply in the Soviet Union, in which, according to its Constitution (Section 4), "the socialist system of economy" is the economic foundation, is based upon sale and purchase (see *supra*).

Likewise inheritance, which was abolished in 1918, was restored in 1922, but with important limitations, and was then viewed as a compromise temporarily admitted. But the limitations were gradually removed and in 1938 the civil law textbook characterized the older view as a "subversive conception" and asserted that "the recognition of succession rights in the 1936 Constitution demonstrates their importance for the citizens of a socialist society." Again, it has been stated that the inheritance of property permitted within a socialist society becomes socialist and different from inheritance in the capitalist world.[36] Private ownership,

[35] Quoted from Vyshinsky, Situation on the Socialist Theory of Law Front (in Russian 1937) 12.

[36] See Chapter 17.

admitted with some limitations by the Civil Code in 1922 and so termed by the Code, was subjected to more limitations in the 1936 Constitution and as such was termed "personal ownership" in contrast to capitalist "private ownership." [37] Thus, in some instances, a traditional legal term is used in the soviet law to express an altogether different concept, in others an unusual term designates a traditional institution. This situation calls for a careful analysis of soviet legal institutions, which alone can serve to define their true nature.

[37] See Chapter 16.

Chapter 4

Present Order: Social

I. Family, Marriage, Divorce

1. Early Laws on Domestic Relations

Marriage and divorce were among the first institutions to be affected by the earliest soviet revolutionary decrees. In December, 1917, during the second month of the soviet regime, two decrees appeared. One introduced divorce upon consent of both spouses or even upon the request of one of them. In both instances, no statement of grounds was required.[1] As a soviet jurist commented later: "A dissoluble marriage, and not a lifelong union, was the first principle of the new legislation."[2] The second decree substituted civil marriage[3] for religious marriage which had been the dominant form of marriage under the Russian presoviet law.[4]

The meager provisions of these decrees were replaced in 1918 by a Code of Laws Relating to Acts of Civil Status, Marriage, Family and Guardianship. The Code followed in the main the decrees but showed a radical departure from the traditional family concept. "Birth itself," declared the Code, "shall be the basis of the family. No differentiation whatsoever shall be made between relationship by birth in or out of wedlock."[5] This

[1] R.S.F.S.R. Laws 1917-1918, text 152.

[2] Brandenburgsky, Family, Marriage and Guardianship Law (in Russian 1927) 19; *id.*, Course in Family and Marriage Law (in Russian 1928) 40.

[3] R.S.F.S.R. Laws 1917–1918, 160.

[4] See Chapter 1, note 56.

[5] Code of Laws on Acts of Civil Status, Marriage, Domestic Relations and Guardianship, R.S.F.S.R. Laws 1917–1918, text 818, Section 133.

provision was given retroactive effect. A soviet professor commented upon this principle, which was sustained until 1944, that "soviet legislation has completely detached family relationship from marital relationship. Family relationship or consanguinity is not based, with us, upon marriage but upon birth." [6] The Code emphasized that children have no rights to the property of the parents and vice versa.[7] While stating the parental duties to take care of the minor children and their education, the Code failed to provide for the protection of parental authority or for the responsibility of parents for their children.[8] The duty of parents to give maintenance to their children who are minors or destitute and unable to work and, conversely, that of children to support parents who are destitute and unable to work, were recognized only insofar as children "are not provided for from public or State funds" and parents do not receive old age pensions or other form of social security.[9]

Since that time, the soviet law has followed the principle that the duty of maintenance does not rise from the family relationship unconditionally. Only those members of a family may claim support who are destitute and unable to work. Thus, only minor or disabled children may claim support from the parents, and one spouse is obligated for alimony only if the other party to the marriage is destitute and unable to work. Such a duty of maintenance is conditional further upon the finding by the court that the obligated spouse is able to render support, and in any event the obligation expires

[6] Brandenburgsky, Family, Marriage and Guardianship Law (in Russian 1927) 8.
[7] *Lex cit.*, note 5, Section 160.
[8] *Id.*, Sections 150 *et seq.*
[9] *Lex cit.*, note 5, Sections 161 Note, and 163.

one year after the divorce.[10] The Supreme Court of the R.S.F.S.R. stated in 1929 that "the right of maintenance may not be used as a means of promoting parasitism and leisure of some members of the family at the labor and expense of others."[11]

2. The Code of 1926

(a) *Marriage.* A new code adopted for the R.S.F.S.R. on November 19, 1926,[12] not only is at variance with the former Russian law but also has made the soviet civil marriage totally different from civil marriage in any other country. The Code of 1918 prescribed that "only a civil (soviet) marriage, registered in the Civil Status Record, shall produce the rights and duties of spouses"[13] and denied any legal effect to religious marriage.[14] However, registration with civil authorities was termed in several places as "celebration" [15] or "contracting" of

[10] Code of Laws on Marriage, Family and Guardianship of 1926, R.S.F.S.R. Laws 1926, text 612, Sections 14, 15. In the Ukraine the payment of alimony to a wife is not limited to any period of time; in Georgia and Uzbekistan it is payable for three years after the divorce.

[11] R.S.F.S.R. Supreme Court, Civil Appellate Division, Ruling of June 11, 1929, Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 1929) 32.

[12] R.S.F.S.R. Laws 1926, text 612, in effect since January 1, 1927. For translation see Volume II, No. 3. It was enacted after the official formation of the Soviet Union (the U.S.S.R.) and therefore took effect only in that particular soviet state, viz., the R.S.F.S.R. However, similar codes were enacted in the sister republics. Subsequent federal legislation resulted in the uniform amendments of these codes. The R.S.F.S.R. Code served as a pattern for all the others and at present is in effect in the Kazak, Kirghiz, Latvian, Lithuanian, Estonian, and Karelian republics. Major differences between the codes are indicated in the comments to the individual sections of the Code in Volume II.

[13] *Lex cit.*, note 5, Section 52.

[14] The effect of religious marriage antecedent to the Law of December 20, 1917 (see *supra*, note 3) on the establishment of soviet registration of marriages in a given locality was maintained by both Codes, *lex cit.*, note 12, Section 2, Note.

[15] *Lex cit.*, note 5, Sections 53–58.

marriage, and the Code of 1918 expressly prescribed that "the marriage shall be considered contracted upon the moment of entry thereof on the book of records."[16]

The Code of 1926 uses different language. A more than terminological significance has been attached to the word "registration." The original provisions of the Code suggested that such registration was not, strictly speaking, equivalent to the celebration of a marriage.[17] It supplied only the best proof that a marriage existed, until the contrary was established in court. "The registration of marriage," reads the Code, "shall furnish conclusive evidence of the existence of the state of matrimony." [18] The report of the Commissar for Justice introducing the draft of the Code explained that "the Code attaches to the official legalization of a marriage the significance of a technical means of certification of a certain fact in order to facilitate proof thereof in all instances where a need arises to protect a right, e.g., for maintenance, succession and the like." [19] Consequently, registration was a mere form of attesting; but the marriage itself came into being independently of the registration. Instead of declaring the invalidity of a religious marriage, the Code provided that "Documents attesting

[16] *Id.*, Section 62.

[17] *Lex cit.*, note 12, Sections 3, 6(a), and 12.

[18] The R.S.F.S.R., Byelorussian and Armenian Codes, Section 1; Ukrainian Code, Section 105 (also Azerbaijan, Uzbek and Tadjik were different as follows):

Marriages must be registered in the Offices of Civil Status Record. Only registration in such offices affords indisputable proof of the existence of marriage, unless refuted by a court decision.

Turcoman Code, Section 2:

Only civil marriage registered in the Office of Civil Status Record creates the rights and obligations of spouses, provided for by the present code.

The text of the R.S.F.S.R. Code was changed after the pattern of the Turcoman Code in 1945 in accordance with the Edict of July 8, 1944 (*cf. infra*, note 53).

[19] Brandenburgsky, *op. cit.*, note 6 at 22.

the fact of the celebration of a marriage according to religious rites shall have no legal effect." [20]

In accord with the concept of registration as mere evidence of marriage, the Code instructed the courts what "evidence of marital cohabitation, in case the marriage was not registered," should be sufficient for the court. These were "the fact of cohabitation, combined with a common household, manifestation of marital relations before third parties, in personal correspondence and other documents as well as mutual financial support, the raising of children together, if supported by circumstantial evidence, and the like." [21] Moreover, "persons who live in a state of *de facto* matrimonial relations, not registered in a manner prescribed by law, shall be entitled to legalize at any time their relations stating the period of factual cohabitation." [22] Thus, on the one hand, any informal cohabitation has the effect of marriage with respect to marital property rights and succession rights of spouses and children, if duly proved.[23] On the other hand, a religious marriage has no legal effect in itself, but if followed by factual marital relations, it assumes the status of a *de facto* marriage with all the legal consequences thereof. The Code expressly pro-

[20] R.S.F.S.R. (and Byelorussian) Codes, Section 2:

. . . Documents [in Byelorussia: and the testimonies of witnesses] certifying the fact of celebration of marriage according to a religious ritual have no legal effect.

Ukrainian Code, Sections 104 and 106:

104. Only civil marriage is recognized in the Ukraine.

106. Celebration of a religious ritual of marriage has no legal effect and cannot serve as evidence of contracting a marriage.

[21] R.S.F.S.R. Code (as enacted in 1926), Sections 11, 12. The provisions of the White Russian and Armenian Codes were similar. The Georgian and Ukrainian Codes recognized *de facto* marriage to a lesser degree; the Azerbaijan, Uzbek and Turcoman Codes had no provisions for a *de facto* marriage.

[22] *Id.*, Section 3.

[23] *Id.*, Section 11.

vides that the registration of a marriage must be denied if at least one of the prospective registrants "is still bound by a registered or unregistered marriage." [24] Thus, the existence of a *de facto* marriage becomes an impediment to registration of another marriage.

The Code also contains other more usual requirements such as mutual consent of the registrants and attainment by them of a marriageable age. It prohibits registration of marriage to persons adjudicated weak-minded or insane, to relatives in the direct line of descent, and between brothers and sisters of full blood or half blood.[25] Thus, cousins, uncle and niece, or aunt and nephew may marry. Difference of race or religion is irrelevant but difference of nationality (citizenship) has become of importance since February 15, 1947. Prior to that date, soviet nationals could marry aliens, but marriage did not affect the nationality of spouses, each retaining his or her original national status.[26] Since February 15, 1947, marriages between soviet nationals and aliens have been forbidden.[27] The 1926 Code has

[24] *Id.*, Section 6.

[25] These requirements are set forth in the R.S.F.S.R. Code, Sections 4, 5 and 6; Ukrainian Code, Sections 110, 111, 112; Byelorussian Code, Sections 5–7, 9. Section 8 of the latter Code and Section 6, subsection "C," of the Georgian Code, also prohibit marriages between parents and children by adoption and between guardian and ward while the guardianship lasts.

The soviet Code also requires from the prospective spouses the presentation of documents attesting their identity, a signed statement denying any impediment to marriage, and a statement to the effect that they are mutually informed of each other's state of health, especially with regard to venereal and mental diseases and tuberculosis. They must also state how many registered marriages (prior to 1944 also *de facto* marriages) each of them has previously contracted and how many children each has. R.S.F.S.R. Code, Sections 131, 132. Disease, if known to the partner, is no impediment. No medical certificate of health is required. Giving of false information or concealing of an impediment in a statement given to the Civil Status Registry is punishable by fine or imprisonment not to exceed one year, R.S.F.S.R. Criminal Code, Section 88.

[26] *Id.*, Section 8, also Soviet Nationality Statute of 1938, Section 5 (for its translation see Volume II, No. 4).

[27] Edict of February 15, 1947, Vedomosti 1947, No. 10. Its provisions

maintained equality of the rights of both spouses. They may use a common surname, that of husband or wife as they decide, or continue to use their prenuptial names. The wife is free to select an occupation.[28] A change of residence by either husband or wife does not oblige the other spouse to follow.[29]

Marriageable age for men is 18 but for women it is 16 in the Ukrainian, Moldavian, Georgian, Azerbaijan, Uzbek and Tadjik republics and 18 in the R.S.F.S.R. and other republics.[30] In the R. S. F. S. R. and the republics which adopted its Code, marriageable age for a woman may, in a given case, be reduced by the authorities to 17.[31] In the Ukrainian and Moldavian republics, marriage may be permitted by the authorities to persons residing in rural localities who are six months below the required age.[32] Marriage with persons under age is a crime punishable by imprisonment not to exceed two or three years under the R.S.F.S.R. Criminal Code,[33] or not to exceed five years in the Turcoman Soviet Republic.[34]

(b) *Children.* The rights of children to maintenance and succession did not depend, under the original provisions of the Code of 1926, on their being born in reg-

were incorporated into the R.S.F.S.R. Code by the Edict of April 2, 1947, *id.*, No. 13.

[28] *Lex cit.*, note 12, Section 7.

[29] *Id.*, Section 9.

[30] *Id.*, Section 5.

[31] *Id.*, Section 5, Note.

[32] Ukrainian Code, Section 109, Note.

[33] R.S.F.S.R. Criminal Code, Sections 151, 198. The R.S.F.S.R. Supreme Court ruled that under these sections and Section 129, the same penalty may be imposed upon a priest who celebrates a religious marriage between persons one of whom is under age. "R.S.F.S.R. Supreme Court, Plenary Session, Ruling of June 23, 1929," Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 1935) 292.

[34] Turcoman Criminal Code, Section 150, as amended December 15, 1935, Turcoman Laws 1935, text 80.

istered wedlock. The parent-child relationship remained totally independent of any marriage, registered or not.[35] Fatherhood, if established in court, entailed the liability of supplying maintenance and support and gave the right of succession to children born in or out of wedlock.[36] But the qualifying clause of the Code of 1918 (see *supra*), making the duty of mutual support of parents and children dependent upon the absence of public or government support, was omitted. The duty of maintenance was stated outright and established under certain conditions between the grandparents and children, brothers and sisters, stepparents and stepchildren, adopted parents and adopted children, and even for foster parents toward foster children.[37] The State evidently did not visualize a social security system as a substitute for support by next of kin.

Several other provisions of soviet statutes contributed to a new background for sexual life in the Soviet Union. In 1920 abortion was permitted.[38] The soviet Criminal Codes did not provide for punishment of bigamy,[39] incest (except for the Georgian and Azerbaijan republics), adultery, and homosexuality. No privilege to refuse testimony against close relatives, nor exemp-

[35] R.S.F.S.R. Code (as enacted in 1926), Section 25; also Civil Code, Section 418, as in force before June 12, 1945.

[36] *Id.*, Sections 28–32.

[37] *Id.*, Sections 42, 42^1, 42^2, 42^3, 48–50, 54–55.

[38] November 18, 1920, R.S.F.S.R. Laws 1920, text 471.

[39] Section 199 of the R.S.F.S.R. Criminal Code penalizing bigamy and polygamy is placed in the chapter dealing with "offenses constituting the survival of tribal life." Therefore, the soviet courts and jurists consider it not applicable outside of cases arising in localities where tribal custom or Mohammedan religion allows such marriages. *Cf.* 2 Civil Law Textbook (1938) 424, 425; Criminal Law, Special Part, Goliakov, editor (in Russian 1943) 197. However, no such comment is stated in the most recent commentary on the Criminal Code. *Cf.* Trainin and others, R.S.F.S.R. Criminal Code, A Commentary (in Russian 2d ed. 1946) 272.

Incest is a punishable act under the Criminal Code of the Georgian and Azerbaijan republics. Criminal Law, Special Part (in Russian 1943) 198.

tion from penalty for misprision in case of failure to report a crime committed by a close relative is provided for in the soviet law.

In this study devoted to law we cannot discuss the effect of these laws upon the morals, birth rate and family life.[40] It suffices to state that a reverse trend in legislation started about 1935. In 1935 the parents were made responsible for the disorderly conduct and "hooliganism" of their children and held liable to fine up to 200 rubles [41] by police authorities. Prior to 1935, minors were not held criminally responsible before the age of sixteen[42] and were not liable for torts before the age of fourteen.[43] The parents or guardians of minors who caused injury after reaching the age of fourteen were not liable, the minors alone being responsible for damages. But in 1935 parents were made liable jointly with minors who had reached the age of fourteen.[44] It was also enacted in 1935 that "minors who have reached twelve years of age and are indicted for larceny, violence causing bodily injury or mayhem, or murder or attempted murder, shall be tried by the criminal court, which may impose upon them any measure of punishment."[45] In 1940 this rule was extended to minors who have reached twelve years of age and who commit an act endangering railroad traffic, such as loosening rails, placing objects on the rails, and the like.[46]

The Presidium also ruled that the Act of 1935 applies not only to intentional offenses, but also to offenses of

[40] For a recent discussion of these effects see Timasheff, the Great Retreat (1941) 192–193.
[41] U.S.S.R. Laws 1935, text 252, Section 18.
[42] R.S.F.S.R. Criminal Code of 1926, Section 12.
[43] Civil Code, Sections 9 and 405, as in force prior to 1936.
[44] *Id.*, as amended by R.S.F.S.R. Laws 1936, text 1.
[45] U.S.S.R. Laws 1935, text 155; R.S.F.S.R. Laws 1936, text 1.
[46] Vedomosti 1940, No. 52, 4.

minors committed through negligence.[47] In 1941 it was enacted that for all other offenses minors are subject to penal prosecution beginning with the age of fourteen.[48] Moreover, the Council of People's Commissars ordered, on June 15, 1943, the establishment of special reformatory colonies under the People's Commissariat of the Interior (see *infra*, Chapter 7), for confinement without judicial procedure of minors eleven to sixteen years of age, who are waywards, vagrants, or have committed petty larceny and other minor offenses.[49]

After 1936, a series of laws were enacted, attaching to divorce some inconveniences, such as making it slightly more difficult and expensive.[50] Abortion was made a punishable offense in 1936[51] and homosexuality in 1934.[52] But, beginning in 1944, several laws were adopted affecting the basic principles of the entire soviet law of domestic relations. Though enacted in a time of war emergency, these laws are apparently intended to remain an element of the soviet legal system.

3. Reform of 1944

Since July 8, 1944, only a marriage registered with the Civil Registry Office has had the legal effect of a marriage and created the rights and duties of husband and wife and parenthood uniformly in the whole of the

[47] Edict of May 31, 1941, Vedomosti 1941, No. 25.

[48] July 7, 1941, Vedomosti 1941, No. 32.

[49] Criminal Law, General Part, Goliakov, editor (in Russian 1943) 137.

[50] U.S.S.R. Laws 1936, text 309, Section 28, established the fee for the first divorce at 50 rubles, for the second at 150 rubles, and for the third and subsequent divorces at 300 rubles each. Besides, a notation of divorce must be made in the passport.

[51] June 27, 1936, U.S.S.R. Laws, text 309, Art. I, Sections 1–4.

[52] Criminal Code of the R.S.F.S.R., Section 154*a*, as enacted on April 1, 1934, R.S.F.S.R. Laws 1934, text 95. No provision penalizing incest or bigamy, outside of cases specified *supra*, note 39, was made thus far.

Soviet Union.[53] Persons who were living in *de facto* marital relations prior to July 8, 1944, may, however, legalize their marital status by registering the marriage and indicating the time which has elapsed since the beginning of their conjugal life. If this cannot be done because one spouse is dead or missing in action, the other spouse may petition the court to declare that the person dead or missing is his or her spouse.[54]

The mother of a child born before July 8, 1944, outside a registered marriage, may claim alimony for the child from the person who is the natural father of the child only if he has been entered as such by the Civil Registry Office, and such children have succession rights to the property of the person so entered.[55] But all children born after July 8, 1944, outside a registered marriage have no succession rights to the father's property and may not claim the father's name. Nor are such fathers liable for maintenance and support of children born outside a registered marriage.[56] However, mothers of children born after July 8, 1944, outside a registered marriage receive aid from the government in a small fixed amount.[57] Thus, children born outside a

[53] Edicts of the U.S.S.R. Presidium of July 8, 1944, Sections 19, 20, Vedomosti 1944, No. 37, and of March 14, 1945, Vedomosti 1945, No. 15. These federal acts were incorporated by the R.S.F.S.R. Presidium in the Code on Marriage, Etc. by the Edict of April 16, 1945, Vedomosti 1945, No. 26, and in the Civil Code by the Edict of June 12, 1945, Vedomosti 1945, No. 38.

[54] R.S.F.S.R. Code of Laws on Marriage, Etc., Section 1, Note, as amended by the Edict of April 16, 1945, Vedomosti 1945, No. 26, issued to implement the Edict of November 10, 1944, *id.* 1944, No. 60.

[55] *Id.*, Section 29, Note, Section 30 as amended on April 16, 1945.

A person may be entered only upon his application, by the Civil Registry Office, as the father of a child born out of wedlock. Prior to July 8, 1944, such an entry could also be made upon a court order declaring paternity. *Lex cit. supra,* note 12, Sections 28–32, 142.

[56] *Id.*, Sections 27, 29 as amended April 16, 1945; Civil Code, Section 418, as amended June 12, 1945, Vedomosti 1945, No. 38.

[57] Edict of July 8, 1944, Section 19, Vedomosti 1944, No. 37.

19. Be it enacted that the rights and obligations of husband and wife provided for under the Codes of Laws on Marriage, Family and Guardian-

registered marriage after July 8, 1944, are comparable to illegitimate children in other countries, even if such terminology is not used. It remains to be seen whether the change in legal status will be followed in daily life by a social stigma on illegitimacy. This at least has been the story of illegitimacy in the past.

4. Divorce

No less radical is the change with regard to divorce. Prior to July 8, 1944, either spouse had complete freedom to discontinue marital life without stating the reason therefor. The divorce was recorded by the Civil Registry Office, not only upon a declaration by both spouses but also upon a unilateral declaration by either spouse of his or her desire to discontinue conjugal life.[58] Neither a statement of reasons for such action nor any judicial proceedings were required. The other party was summoned, but in case he failed to appear, the entry of the divorce in the Civil Registry Record was made, and the respondent had no right to oppose the divorce.[59] In other words, just as soviet marriage was merely a registration of existing marriage, the soviet divorce was not a divorce but a registration of the fact that cohabitation was discontinued. The court admitted evidence of the fact if it was not registered and attached all legal consequence to it if proved.[60] But since July

ship of the soviet constituent republics shall arise from legally registered marriages only.

Persons who have been in *de facto* marriage relations prior to publication of the present edict may legalize their relations by registering the marriage and stating the actual period during which their marital life lasted.

[58] *Lex cit.*, note 54, Section 18, as in force before 1944.

[59] *Id.*, Section 140, as amended May 10, 1937, R.S.F.S.R. Laws 1937, text 40. With regard to the service of the registration of the divorce upon the absent party the soviet legislation fluctuated. See Hazard, "Law and the Soviet Family" (1939) Wisc. L. Rev. 239 *et seq.*

[60] *Id.*, Section 20 (as in force before April 16, 1945):

8, 1944, divorce has been granted only by the courts and only for reasons which the court deems justifiable.[61] Such reasons are not specified by statute and are left to the discretion of the courts.

Only very incomplete information is at present available regarding the grounds for which divorce is actually granted under the new law. An analysis of 400 cases decided by eighteen various courts appeared in the July issue of the periodical of the Law Institute of the U.S.S.R. Academy of Science.[62] The author of the article warns that the number of cases examined is too small to justify any general conclusions. His findings are reported here for what they are worth.

Two thirds of the suits examined either were instituted by mutual consent or were not contested by the other defendant, and in all of these cases the divorce was granted. Thus, it seems that mutual consent may become a ground for divorce in the Soviet Union. Divorce was not granted in six per cent of the total number of cases, but, if contested cases alone are considered, the percentage of divorces not granted is as high as twenty-three. Absence of guilt on the part of the defendant is

The fact of termination of marriage may also be established by the court in the absence of a registration of divorce. *Cf.* Case of Gromoglassov, R.S.F.S.R. Supreme Court, Civil Appellate Division (1929) Judicial Practice No. 29, 8.

Annulment of marriages is not expressly provided for in the soviet statutes with the exception of the Codes of the Ukrainian (Sections 113–116) and Azerbaijan (Section 12) republics. However, it was held in practice that a marriage registered under violation of legal requirements might be declared null and void by the court. The above-mentioned codes provide that in case a marriage is registered between persons under age and is continued after the couple has reached the marriageable age, their marriage may not be annulled. The same applies in case of pregnancy or birth of a child subsequent to such marriage. 2 Civil Law Textbook (1938) 429.

[61] Edict of July 8, 1944, Vedomosti 1944, No. 37; Code of Marriage, Etc., Sections 21, 22, as amended April 16, 1945.

[62] Sverdlov, "Some Problems of Judicial Divorce" (1946) Soviet State No. 7, 22–26.

the reason assigned for refusal to grant divorces. In all cases where divorces were not granted, the parties had children. However, the author is not prepared to state to what extent the presence of children may have influenced these decisions. In the contested cases examined, divorce was granted for the following reasons: the defendant was guilty, in particular he had committed adultery or his behavior in everyday life was proved such as to make life together impossible; mutual guilt made life together impossible; continuation of life together became impossible for reasons for which no party was to blame, e.g., long absence or chronic disease.

Divorce proceedings pass through two stages, each in a different court. The petition for divorce must be filed with the lower court, the people's court, by either spouse or both of them jointly. The petition must specify the reasons for which divorce is sought, as well as the witnesses and other evidence of the facts alleged. The people's court orders notice of the filing of the divorce suit to be published in the local newspaper at the expense of the plaintiff.[63] The court does not decide the case but merely prepares it and attempts to reconcile the spouses. It summons the spouses to appear in person, hears them and the witnesses in order to ascertain the reasons for divorce, and takes steps for the reconciliation of the spouses. Only if the people's court fails to reconcile the spouses, do the proceedings in the case enter the second and final stage: thereupon, the petitioner may file a complaint for divorce with the next higher court,[64] which

[63] *Lex cit.*, note 39, Sections 18, 19, 20, as amended April 16, 1945. There are no statutory provisions concerning service of a summons on a nonresident defendant. However, the general rule of the soviet civil procedure is that all summonses and other communications of the court addressed to institutions and persons abroad must be served through the Ministry of Foreign Affairs. *Cf.* Code of Civil Procedure, Section 67.

[64] Depending upon the location of the people's court, the next higher court

hears the case in public on the ground of the submitted evidence and grants the divorce if it finds the petition is based on good reasons. At the request of either party, the court may order the case to be heard *in camera*.[65] The decision rendered is subject to appeal in accordance with the general rules.[66] The government fee for filing the petition for divorce is one hundred rubles and from five hundred to two thousand rubles for registration of the divorce, according to the determination of the court.[67] Thus, it is now more difficult to obtain a divorce in Soviet Russia than in many capitalist countries where civil marriage is recognized.

5. Early Soviet Attitude to Marriage and Divorce

The unlimited discretion of the soviet courts in granting or refusing divorce signifies a departure from the original soviet philosophy. The latitude of the departure appears striking upon comparison of this power with the following statements of such an outstanding leader as Lenin, which statements were still being quoted in soviet legal textbooks on the eve of the reform:

> Reactionaries are against freedom of divorce and are calling for "cautious treatment of such freedom" and shouting that it means "dissolution of the family." But democracy considers that the reactionaries are hypocritical and are in fact defending the omnipotence of the police and bureaucracy, the privilege of one sex and the worst kind of oppression of women, that, in fact, freedom of divorce does not mean "dissolution" of family relations but, on the contrary, their strengthening on

is the provincial, regional, circuit, or city court, or the supreme court of an autonomous republic.

[65] R.S.F.S.R. Code on Marriage, Etc., Sections 18, 22, as amended in 1945.

[66] Instruction of the U.S.S.R. Commissar for Justice, approved by the Council of People's Commissars on November 27, 1944, Section 21, *cf.* Reference Book of the People's Judge (in Russian 1946) 304.

[67] *Lex cit.*, note 65, Section 138.

democratic grounds, the only possible and stable grounds in a civilized society. . . .[68]

. . . It is impossible to be a democrat and a socialist without immediately demanding complete freedom of divorce, because the absence of such freedom is the utmost oppression of the subdued sex, woman—although it does not take brains to gather that the recognition of freedom to leave one's husband is not an invitation for all wives to leave their husbands.[69]

Likewise, the textbook on private law insisted in 1938 that the soviets "do not have and could not have what is known in capitalist countries under the name of divorce proceedings."[70] But the new soviet law expounded above provides for divorce proceedings which are stricter and offer the parties less privacy and certainty as to the final outcome than those of many capitalist countries.

Similarly, little credence may be given to the contention of the same textbook that "the socialist revolution which has created new social relations in the production and distribution of commodities and in the sphere of culture and everyday life, is also creating new, socialist family relations."[71] The development of the soviet law took the opposite course. Thus, a code on domestic relations showing the most radical departure from the traditional family law was enacted in 1926 at the time of relaxation in the pursuit of socialist reconstruction. The declaration of the victory of a socialist economic order made in the 1936 Constitution was followed by a gradual withdrawal of innovations in family law. There may still be doubt respecting the social objectives sought by the soviet legislators through the enactment of the above-mentioned Code. Was this visualized as a preparatory step toward a society without the family, where

[68] Lenin, 17 Collected Works (in Russian 2d ed.) 448.
[69] Lenin, 19 *id.* 232.
[70] 2 Civil Law Textbook (1938) 430.
[71] *Id.* 417.

the State takes care of the children and the union of man and woman is left to the unlimited freedom of personal inclination, or did the legislators believe in the monogamous family as a union for life but merely considered unnecessary any legal safeguard for such family? Many statements bluntly supporting the first alternative were made by prominent soviet leaders in the early years of the soviet regime. For instance, Madame Kollontay, at one time diplomatic representative of the Soviet Union in Norway, writer on the family under communism and a prominent member of the old bolshevik guard, wrote in 1919 that "the family has ceased to be a necessity both for its members and for the State." [72] Likewise, Bukharin, who, though later executed as a traitor, was for a long time a recognized theorist of the soviet regime, characterized the family as "a formidable stronghold of all the turpitudes of the old regime." [73] An anticipation of the disappearance of the family in the socialist State is evident in the following explanation of the soviet laws on domestic relations given in 1927 by Professor Brandenburgsky, the author of standard texts on the subject:

> Until socialism is achieved the individual family is inescapable. . . . We undoubtedly are approaching public upbringing of children, free labor schools, the widest social security at the expense of the State. If at present we maintain the duty of mutual support within the family, because the State cannot yet. for the time being, replace the family in this respect . . . The family creating a series of rights and duties between spouses, parents and children, will certainly disappear in the course of time and will be replaced by governmental organization of public education and social security.[74]

[72] Kollontay, The Family and the Communist State (in Russian 1919) 8.

[73] Proceedings of the XIIIth Congress of the Communist Party (in Russian 1924) 545.

[74] Brandenburgsky, Course in Family and Marriage Law (in Russian

Moreover, certain provisions of the Code led the R.S.F.S.R. Supreme Court to a tacit recognition of the legality of bigamy and loose sexual life. Thus the court affirmed a decision of a lower court by which two women were declared *de facto* wives of a decedent and awarded both a share in the estate. The court declared in part: "if it is established that on the day of his death, the decedent had two *de facto* marriages, both *de facto* wives have the right to inherit his property." [75] According to another decision,[76] legal recognition of a *de facto* marriage was ruled out only if such marriage conflicted with a registered marriage, unless the registered marriage was factually discontinued. Under the provisions of Section 32 of the Code, which was repealed in 1945, should it be established in a suit instituted for maintenance and support against the alleged father of a child born out of wedlock that the plaintiff had relations with several men, "it was the duty of the court to order the joinder of all such persons as parties defendant, to ascertain those with whom the plaintiff had lived during the period of conception and to impose upon one of them, under Section 32 of the Code of Laws on Marriage, Etc., the duty to supply maintenance and support." [77]

1928) 20. In his earlier work, *op. cit. supra,* note 6 at 10 the author expressed the same idea.

[75] Case No. 3817, R.S.F.S.R. Supreme Court, Civil Appellate Division, (in Russian 1929) Judicial Practice No. 16, 5; abstracted in the Code of Laws on Marriage, Etc., (in Russian 1938) 45. (Omitted in the 1944 ed.) For a meticulous survey of the soviet divorce law as compared with the American, before the recent changes, see John Hazard, *op. cit. supra,* note 59 at 225 *et seq.* However, any statement there concerning prerevolutionary law is erroneous.

[76] R.S.F.S.R. Supreme Court Presidium, Ruling of September 16 and 17, 1935, Protocol No. 67 (1935) Soviet Justice No. 31, 24:

The court may not recognize the existence of *de facto* marital relations in the presence of a simultaneously existing registered marriage.

[77] R.S.F.S.R. Supreme Court, Civil Appellate Division, Letter of In-

6. New Attitude

However, all these rulings and statutory provisions seem to be in palpable discord with views which have recently been voiced in the soviet press and in particular by the legal writers. Commenting upon the prohibition of abortion and the increase of the registration fee for divorce, *Pravda* stated on May 28, 1936:

> So-called free love and loose sexual life are throughout bourgeois and have nothing in common either with socialist principles and ethics or with the rules of behaviour of a soviet citizen. Marriage is the most serious affair in life. . . . Fatherhood and motherhood became virtues in the soviet land.[78]

Quoting these statements, Boshko, a soviet professor of law, wrote in the official periodical of the Attorney General:

> Marriage by its basis and in the spirit of the soviet law is in principle essentially a lifelong union. . . . Moreover, marriage receives its full lifeblood and value for the soviet State only if there is birth of children, proper upbringing, and if the spouses experience the highest happiness of motherhood and fatherhood.[79]

The author sought to reconcile these ideas with the then

struction of June 11, 1929, Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 1935), 144, quoted also in the Code of Laws on Marriage, Etc., 1938 edition, 58, but omitted in the 1944 edition. The repealed section of the Code reads:

> 32. Should the court in the deliberation of a paternity matter establish that in the period of time when the child was conceived the mother also had sexual relations with other persons besides the person mentioned in Section 28 of the present Code, the court shall render judgment, declare one of such persons the father of the child, and impose upon him the duties provided for in Section 31 of the present Code.
>
> "The person mentioned in Section 28" means the person whom the mother claims to be the father of the child. Section 31 imposes the duty of maintenance and support and of participation in the bearing of expenses of birth. Both sections were repealed in 1945.

[78] Pravda, May 28, 1936, editorial.

[79] Boshko, "The Concept of Marriage in the Soviet Socialist Law" (1939) Socialist Legality, No. 2, 55, 56.

existing laws. Boshko argued that: "Freedom of divorce is not in conflict with marriage as a lifelong union, but on the contrary it presupposes such freedom as its foundation (which may admit of some exceptions)." [80] However this reconciliation is only verbal. The tenor of the discussion sounds like the inauguration of a program of support of the family along traditional lines, and the recent soviet legislation on marriage and divorce is the implementation of such a program. It has gone even further than in many countries where only civil marriage is recognized. It bars common-law marriage, bastardy proceedings, and the duty of a father to support his illegitimate child.

It is also significant that a recent law seeks to create an atmosphere of solemnity for the registration of soviet marriage. Local authorities have been ordered to supply the Civil Registry Offices with well-furnished quarters appropriate for the celebration, with a separate waiting room, and to keep them in good order. The date for registration must be arranged in advance; it takes place in the presence of the prospective bride and groom, and, if they wish, of their parents and friends. A certificate is then handed over to the newlyweds in the presence of a representative of the local administration. The managers of the government establishments and the collective farms are advised to furnish the newlyweds transportation to the Registry Office and to help them buy furniture, bedding, etc., for cash at fixed government prices.[81]

7. Inheritance

Recent changes in the law of inheritance reveal a sim-

[80] *Ibid.*
[81] Act of January 8, 1946, R.S.F.S.R. Laws 1946, text 8.

ilar tendency. Only children born in a registered marriage have the right of succession. The right of testate and intestate succession granted in 1922 only to the surviving spouse, direct descendants, and actual dependents of the decedent, was extended in 1945 to parents, brothers, and sisters. In the absence of such relatives, a person may bequeath his property according to his free choice. The highest fee collected from the estate does not exceed ten per cent. In contrast to the "abolition of inheritance" decreed in 1918 and its admittance through compromise in 1922, stands the full recognition of inheritance as a sound institution in the present socialist soviet State.[82]

8. Aid to Mothers

There are, however, special soviet features in the soviet family law, as, for instance, the aid given by the State to mothers of children born out of wedlock after June 8, 1944, and to mothers of numerous children. These provisions are designed to support motherhood regardless of whether it is connected with marital ties or not. An unmarried mother of a child born out of wedlock has no right to claim maintenance and support from its father but receives an aid from the government, 50 rubles a month for one child, 75 for two, and 100 rubles for three or more children.[83] A special aid was provided in 1936 for children in excess of seven,[84] and on July 8, 1944, aid was extended for a third child and subsequent children. This aid consists of a lump sum granted at birth, and monthly payments from the date

[82] See Chapter 17, Inheritance Law.

[83] Edict of July 8, 1944. Vedomosti 1944, No. 37 amended Nov. 25, 1947, *id.* 1947, No. 41.

[84] Act of June 27, 1936, U.S.S.R. Laws 1936, text 309, Sections 5, 8, 10, 28; also *id.*, text 448; *id.* 1937, text 145.

when the child becomes two years of age and until it reaches five years. The aid belongs to the mother, whether or not she is married.[85] Special leave with pay must be given to a woman employee on account of pregnancy and birth, thirty-five days before and forty-two days after the birth.[86] Special medals, "Mother Hero," "Mother's Glory," and "Medal of Motherhood," are given to mothers of many children.[87] Some of these provisions show close resemblance to the support of large families established by the Nazi legislation in Germany.[88]

9. Marital Property

The community property of husband and wife common to Western Europe was unknown to the imperial law. There was complete separation of property with no right of the husband to the property of the wife or to its management.[89] The first soviet Code on Marriage, Family, Etc. of 1918 also maintained separation of property, and marital community property was introduced for the first time by the Code on Marriage, Family, Etc. of 1926. However, its provisions do not apply to families engaged in farming, who live under the regime of undivided family property, discussed in Chapter 21.[90]

In general, husband and wife may make contracts regarding property with third parties independently and with each other. Any agreement between the spouses

[85] Edict of July 8, 1944, Section 3.
[86] *Id.*, Sections 6, 7.
[87] *Id.*, Section 12.
[88] Law of March 24, 1936, Reichsgesetzblatt 1936, I 252; also *id.* 1937, I 989, Section 1, subsection 6; *id.* 1940, I 1571.
[89] Civil Laws, Sections 109–118, Svod Zakonov, Vol. X, Part 1, 1914 ed. Some very limited exceptions with regard to dowry were made for two western provinces (Poltava and Chernigov), where up to 1842 the Lithuanian Statute of 1588 was in force.
[90] *Lex cit.*, note 12, Section 10, Note.

intended to restrict property rights of either one is invalid.[91] But on the other hand, the Code of 1926 provides that "the property belonging to each spouse before marriage is separate property. Property earned by the spouses during the marital state is common property of both spouses."[92] Whenever the marital state comes to an end by divorce or by decease of one spouse, this common property is to be distributed. Thus, in case of death, the surviving spouse is entitled to his or her share in the common marital property, in addition to sharing in the estate. The share of the surviving spouse does not belong to the estate and, consequently, cannot be disposed of by will.[93] The size of the share of each spouse depends upon the circumstances of the case; prima facie, it is one-half and, if contested, must be determined by the court.[94]

The novelty of the institution explains why many pertinent problems, especially the extent of the limitation imposed upon a single spouse in disposing of property during the marriage, are not yet settled. Only a few rules are available in this connection. Thus, under the Instruction for Notarial Offices, of November 17, 1939,[95] consent of the marital partner is required for alienation by a married person of a house acquired after marriage, unless the house has been inherited. How-

[91] *Lex cit.*, note 12, Section 13.

[92] *Id.*, Section 10. Similar provisions are to be found in the codes of other republics. The Ukrainian (Section 125, Note), Byelorussian (Section 21, Note 1), and Georgian (Section 17, Note) Codes speak more precisely of property "earned by joint labor." These codes state also that the housekeeping and caring for the children of the one are equivalent to the income-earning labor of the other.

[93] R.S.F.S.R. Supreme Court, Civil Appellate Division, Decision (in Russian 1928) Judicial Practice No. 22.

[94] 2 Civil Law Textbook (1938) 432.

[95] Instruction of the R.S.F.S.R. People's Commissar for Justice of November 17, 1939, concerning Notarial Offices, Section 31; Notarial Offices (in Russian 1942) 26.

ever, no such consent is required for alienation of building tenancies or for mortgages. Several decisions of the U.S.S.R. and the R.S.F.S.R. Supreme Courts have held that articles for personal use of each spouse do not belong to the marital community, such as clothes and articles needed for the exercise of a profession or trade, unless they are articles of luxury or of special value; articles of personal use remain separate property.[96] According to the Statutes of August 10, 1927, and November 3, 1934, sums adjudicated against one of the spouses in compensation for embezzlement, breach of trust, larceny, and similar crimes committed by the spouse against government, co-operative, or public organizations may be collected from the marital community property, provided, however, that such property was augmented by the crime committed and that not more than two years elapsed between the time when the crime was committed and the prosecution was instituted.[97]

For debts made whether jointly or individually by either, spouses are liable with their community property.[98]

10. Conclusion

All the recent changes show that the soviet legislators came to realize the importance of a stable family for sound morals and the restoration of the vital strength

[96] R.S.F.S.R. Supreme Court, Civil Appellate Division (1928), Judicial Practice No. 23; (1930) *id.*, No. 9, abstracted in Code of Laws on Marriage, Family, and Guardianship (1938) 43. U.S.S.R. Supreme Court, Civil Appellate Division, December 23, 1939, No. 827; December 10, 1939, No. 89; February 4, 1940, No. 118, abstracted in Reikhel, "Marital Community Property of Spouses in the Soviet Law" (in Russian 1940) Soviet State No. 8/9, 114, 115.

[97] U.S.S.R. Laws 1927, text 507, Section 2; R.S.F.S.R. Laws 1934, text 243, Section 4.

[98] R.S.F.S.R. Supreme Court Decision (1927) Judicial Practice No. 12, abstracted in Code of Laws on Marriage, Etc. (1938) 43.

of a nation which had just gone through the calamity of a devastating war. It may be also true that the soviets trust the present generation of parents more than the generation two decades ago.[99] In any event family, motherhood, and the authority of parents have gained full recognition. Soviet marriage has at present the features of a normal marriage. But, on the other hand, the recent soviet legislation, though inconsistent with earlier soviet laws, shows a consistency of the soviet policy of interference of the State with the family life of the citizen. In the early stage, soviet laws sought to disrupt and weaken the family ties. At present the interference goes the other way. That strict control by the soviet State over the marriage of soviet citizens is the spirit of recent soviet legislation is well manifested by the law enacted on February 15, 1947, which flatly prohibits any marriage between soviet citizens and aliens. Again, under the old provisions of the Code of 1926, a religious marriage not followed by civil registration but coupled with actual marital life might pass for a *de facto* marriage and give the spouses and children by such a marriage rights of succession and maintenance. Since 1945 such possibility is altogether excluded. Again, divorce, regardless of the ground, is not a matter of right but is left to the unlimited discretion of the soviet court, which is an obedient instrument of government policy. Any quarrel between the conjugal partners, if brought before the court, may result in divorce if the soviet court considers that such corresponds to "the general policies of the soviet government" to which the soviet court must resort under Section 4 of the Code of Civil Procedure in absence of statutory provisions bearing

[99] Hazard, *op. cit.*, note 59 at 225.

upon the case (see *infra,* Chapter 6, II, 2, 3). Vice versa, no party is guaranteed by law that the guilt of the other party will be deemed a sufficient ground for divorce. Moreover, the soviet Attorney General may enter any civil suit, and therefore any suit for divorce, at any stage of the proceedings and may petition the Supreme Court to reopen, ex officio, a case settled by a final judgment (see Chapter 24). Thus, the present law of marriage and divorce protecting strong family ties offers, on the other hand, wider opportunity for the government agencies to interfere with the private life of citizens.

II. Ideological Changes

1. Soviet Patriotism

Some other changes implied in recent soviet laws, especially those enacted during the war, have raised a problem for scholars and observers. They show a drastic departure from some of the views and slogans which, from the inception of the bolshevik revolution in Russia, were strongly associated with the soviet regime. Are these changes so essential as to signify, if considered together with the change in family relations, a great retreat from communism,[100] or are they merely a new shift in communist policy, a great maneuver? Before any attempt at an answer can be made, an inventory of these changes should be taken.

In the first place, internationalism was for a long time regarded by the soviets and their opponents as an integral part of the soviet ideology. As was mentioned

[100] Timasheff, The Great Retreat (1946); Hazard, "Soviet Domestic Policy in the Postwar World" (1946) 40 Am. Pol. Sci. Rev. 89. For a comprehensive survey of major changes lucidly presented and analyzed, see William Henry Chamberlin, The Russian Enigma (1943).

elsewhere, under the provisions of the early soviet constitutions and laws, it was not citizenship, but belonging to the social stratum of toilers, that qualified a resident of the Soviet Union for the permissible exercise of political rights. They were open to an alien toiler and closed to the native nontoiler. Neither was patriotism regarded as a positive phenomenon, nor was Russia's past and knowledge thereof considered useful for a soviet citizen. This attitude was well expressed by Lunacharsky, a leading writer on general problems of culture, and Commissar for Education for a long period of time. In his lecture given at a teachers' college in 1918 on the teaching of history in the communist school he scorned the All-Russian Congress of Teachers, which,

> . . . Stepping in the footprints of the Western European bourgeoisie, began to talk of the need to make the teaching of history nationalist in character and to develop in students "a sound love for one's country."

Lunacharsky bluntly stated, "I do not know what is meant by a sound love for one's country. What does it mean? He insisted that:

> . . . Education must be internationalistic and human. . . . We socialists must, above all, place teaching on the ground of international principles. . . . A teaching of history directed toward the creation of national pride, patriotic feeling, and the like must be rejected; a teaching of history which strives to find in the examples of the past a pattern for imitation must also be rejected.

He candidly recognized that "very little is left" of history as taught in the old school.[101]

In full accord with these ideas, the teaching of history in schools was abandoned, being partly replaced by the

[101] Lunacharsky, Problems of Public Education, Collection of Articles (in Russian 2d ed. 1926) 105, 109, 111.

teaching of the so-called class struggle. Pokrovsky, a representative of Marxian philosophy among the pre-revolutionary professors of Russian history, became the officially recognized leader of the few historical researches conducted casually at the institutions of higher learning. In 1934 and 1936, however, the historical views of Pokrovsky (who had died in the meantime) and his followers were condemned by governmental decrees; teaching of history was introduced in the schools, and a compilation of a new textbook on Russian history was ordered. Such a text was officially approved in 1936.[102]

The error of the Pokrovsky school was found to be that it substituted the abstract Marxian scheme of sociological and economic development for a presentation of the actual course of events in the true setting of time and place, as history should be stated.[103]

Newspapers emphasized the necessity of the study of Russian history. Thus, in *Pravda* it was stated:

> To love one's great free country means first of all to know it and be interested in its past, to be proud of its bright heroic pages, to hate its oppressors and tormentors . . . For a soviet pupil the textbook on history should become the most attractive and fascinating . . . The tendency to discuss history according to sociological stereotypes has nothing in common with Marxism.[104]

With the fall of Pokrovsky's school, several researches in Russian history and the history of Russian law in particular appeared, in which certain political and legal concepts and phenomena incompatible with the communist program, such as the autocracy of the czars, were

[102] U.S.S.R. Laws 1934, text 206; *id.* 1936, text 45. The textbook used now is by Shestakov.

[103] "Problems of the Science of History" (in Russian 1936), Soviet State No. 2, 103 *et seq.*

[104] Pravda, March 7, 1936.

declared to have served the progress of humanity in the past. Moreover, several Russian medieval legal codes were printed, the earliest of which, the Russian Truth, ascribed to the eleventh century, appeared in an elaborate edition, reproducing seventeen versions of text collated with over a hundred manuscripts.[105]

A closer look at one of such publications may illustrate the new attitude towards Russia's past. An edition of the Judicial Code of the Grand Duke Ivan III of 1497 was issued in 1939 by the Gorky Pedagogical Institute Press. The importance of this Code in the history of Russian law was seen by Kalachev, a scholar of the mid-nineteenth century, to lie in the fact that the Code is "a momument based upon autocracy, then first firmly established in our country, and is the cornerstone of all the subsequent development of our written legislation." As has been mentioned elsewhere, soviet law repudiates any continuity with Russian presoviet law. Nevertheless, the author of the preface to the new edition quotes the above opinion of Kalachev and proceeds to state that in the seventeenth century autocracy in Russia served the progress of humanity, supporting his statement by a reference to Engels who likewise regarded the establishment of the absolute power of the Western European kings as a progressive step. As an objective historian, the author of the preface remarks that "although autocracy served progress, this does not eliminate the fact that the conditions of the peasants, the bulk of the popu-

105 Russian Truth (Russkaia Pravda) Volume I (1940), text edited by Grekov; Volume 2, Commentaries by Aleksandrov, Geiman and others (1947), published by U.S.S.R. Academy of Science. The text of the early Russian codes, in English with an introduction, was published in this country by Professor George Vernadsky, Medieval Russian Laws (N. Y. 1947). See also Chapter 8, at p. 281.

lation, deteriorated." [106] The author reproaches the Pokrovsky school for neglecting the study of the Judicial Code of 1497 which "played a progressive role insofar as it contributed to the solution of the historically progressive task of uniting the scattered Russian lands in a single national state." [107]

A comparison of the characteristics of Russia's past, given by Stalin in 1931, with his orders of 1941, shows the change in attitude. In 1931 Stalin said:

> One feature of the history of old Russia was the continual beatings she suffered for falling behind, for her backwardness. She was beaten by the Mongol khans. She was beaten by the Turkish beys. She was beaten by the Swedish feudal lords. She was beaten by the Polish and Lithuanian gentry. She was beaten by the British and French capitalists. She was beaten by the Japanese barons. All beat her—for her backwardness: for military backwardness, for cultural backwardness, for political backwardness, for industrial backwardness, for agricultural backwardness.[108]

But in the gloomiest days of the German invasion of Russia, on November 7, 1941, Josef Stalin, the Commander-in-Chief of the soviet army, called on his troops "to be inspired by the courageous image of our great ancestors" and proceeded to recite the names of Prince Alexander of Neva who had beaten the Germans, Dmitry of Don, who had beaten the Mongol Khan, General Suvorov who had beaten the Turks, Poles, and French, and General Kutuzov who had beaten the French.[109]

Restoration, during the war, of the prerevolutionary names of some cities, and even streets, in Leningrad, renamed in the first years of the soviet regime after rev-

[106] Dobrotvor, Judicial Codes of the Russian State (in Russian 1939) Preface 9.
[107] *Ibid.*
[108] Stalin, "The Tasks of Business Executives," Speech, February 4, 1931, Problems of Leninism (English ed. Moscow, 1940) 365.
[109] Order, Izvestiia, November 9, 1941.

olutionary heroes and events, seemed to emphasize the link with the past.[110]

Beginning in 1938, *Izvestiia, Pravda,* and other official papers have published editorials and statements in which patriotism is praised in words which could be subscribed to by any prerevolutionary conservative writer.

"What is patriotism?" asked Valentin Kataev, author of satirical novels, at the convention of communist writers in April, 1939, and answered: "It is love for one's own country. What is my country? It is my mountains, my trees, my rivers, my seas. It is my history, the history of my people. It is my brothers and sisters, my friends and my beloved ones." He also revealed the reason for which patriotism has been reinstated:

> The concept of patriotism thus interpreted must permeate our literature indeed, and it will be of tremendous benefit if our reader be inoculated with such patriotism. It will broaden his mind, make him courageous and compel him to defend his country, his labor and his friends.[111]

Thus patriotism is fully reinstated and is regarded not only as being compatible with the views expected from a citizen of the soviet land but is directly recommended to him.

2. Ranks and Decorations

The highest military decorations established during the war are dedicated to the memory of the traditional heroes of Russian history, highly esteemed in the czarist days. Thus one decoration bears the name and image of Prince Alexander of Neva, famous for his defeat of

[110] Edict of February 24, 1944, Vedomosti 1944, No. 11 (re cities Pavlovsk and Gatchina); re streets see Resolution of Leningrad Soviet of January 13, 1944, Collection of Edicts, Resolutions, Etc. 1944 (in Russian 1945) 262.

[111] Izvestiia, April 17, 1939.

German Knights in 1242, who was venerated as a saint by the Russian Church.[112] Another decoration bears the name of Suvorov,[113] an eighteenth century general who, though he quarreled with the courtiers and Emperor Paul I, was an outspoken monarchist, cherished the idea of crushing the French Revolution of 1789, actually fought successfully the French revolutionary troops, and is credited with the suppression of the Pugachev rebellion, the greatest peasant rebellion in Russian history. Ivan the Terrible, Peter the Great, Generals Kutuzov and Bagration of the war with Napoleon, and many other personalities of the past are presently glorified in historical researches, newspaper editorials, historical novels, and moving pictures.[114]

It is noteworthy that separate decorations are given to generals only, others to generals and commissioned officers, and still others to enlisted men. This manifests another recent tendency to regulate the military service and certain branches of civil service along the lines of a strict hierarchy of professional bureaucracy of a caste type. Titles, symbols, and insignia common in czarist days and vehemently rejected in the first years of the Revolution, have appeared again. Thus the terms, "officer," which in Russian means commissioned officers only, and "general," were abolished in 1918. The commanding personnel in the Red Army were distinguished by the type of the job performed; they were called commander, squad commander, company commander, corps

112 Vedomosti 1942, No. 30.

113 *Ibid.*

114 Moving pictures: Alexander of Neva, Peter the Great, Suvorov, Ivan the Terrible. A survey of soviet patriotic belles-lettres is given by Tikhonov, On the Eve of a Great Upswing (in Russian 1945) *passim*. See also Osipov, Suvorov (in Russian and English, several editions since 1939); Tarle, Napoleonic Invasion of Russia 1812 (Oxford Press 1942).

commander, army commander, and the like.[115] It is true that these appellations, though implying merely the performance of a job, soon became more like ranks in the European armies than commissions in the American or British army. A company commander not in command of a company continued to wear the appellation unless demoted. But on September 22, 1935, these appellations were replaced by outright ranks, such as lieutenant, captain, et cetera.[116] The term "general" was restored on May 7, 1940;[117] the term "officer" in August, 1943.[118] Prior thereto, in January, 1943, indicia of rank after the imperial pattern were introduced—gold braid epaulets.[119] In the first days of revolution, epaulets became much more than a matter of uniform; they were commonly regarded as symbols of the old regime. During the civil war of 1918–1920, the wearing of epaulets was a distinct mark of anti-bolshevik armies, nicknamed "gold braid epauleters." The volume of the *Soviet Encyclopedia* published in 1930 states that epaulets "were abolished by the November, 1918, Revolution as symbols of class oppression in the army."[120] In 1943 they were introduced again[121] as "emblems of military honor of the soldiers and officers of the Red Army" and "supreme honorary distinctive marks of a warrior."[122] Moreover, ranks, uniforms, and epaulets were introduced for

115 Regulation of service of the higher, senior and middle and commanding personnel of the Red Army, Order of the Military Council of the U.S.S.R., No. 225 of 1928. This order published as a separate pamphlet was the first codification of the scattered rules.

116 U.S.S.R. Laws 1935, texts 468, 469.

117 Vedomosti 1940, No. 15.

118 Vedomosti 1943, Nos. 28, 29.

119 January 6, 1943, for the Army, Vedomosti 1943, No. 2; and February 15 for the Navy, *id.*, No. 7.

120 6 Small Soviet Encyclopedia (in Russan 1930) 624.

121 Vedomosti 1943, Nos. 2 and 7.

122 Izvestiia and Pravda, January 7, 1943.

several categories of civil servants: for diplomats,[123] public prosecutors,[124] and railroad employees.[125] The textbook on administrative law of 1945 comments:

> The purpose of the introduction of ranks and of uniforms for these categories of governmental officials is the further strengthening of service discipline and the elevation of the official authority of these workers. The rank expresses special qualification of the worker, his service experience, his merits, and his authority as a worker in a certain branch of government.[126]

The traditional revolutionary title "People's Commissar" was replaced by the old-fashioned "Minister," and "Council of People's Commissars" changed to "Council of Ministers," the precise name of the imperial cabinet, while the U.S.S.R. "Chief Attorney" was renamed "Attorney General." [127]

3. Citizenship

The 1936 Constitution and the Nationality Statute of 1938 did away with the privileged status of alien toilers and established a uniform treatment of all soviet citizens. The new concept was reflected in the new "military oath" enacted in 1939 instead of the mere promise previously required of service men. Though called an "oath," the new text does not refer to God. The opening clause of the military oath reads: "I, a citizen of the Soviet Union . . ." instead of the former clause, "I, a son of the toiling people. . . ." [128]

[123] Vedomosti 1943, No. 22.
[124] *Id.*, No. 39.
[125] *Id.*, No. 32.
[126] Studenikin, The Soviet Administrative Law (in Russian 1945) 46.
[127] See Chapter 2, note 69.
[128] Vedomosti 1939, No. 1. See also Chapter 2, II, and Chapter 10.

4. Schools

The system of public education also exhibits a return to the prerevolutionary pattern with regard to teaching methods, school discipline, strictness of curriculum and examination requirements, and abolition of coeducation in the secondary schools in large cities.[129] Graduation from secondary school is conditioned upon a special "examination for maturity diploma," [130] in name and essence equivalent to a similar examination before the Revolution. Tuition is required in the upper grades of secondary schools and in the institutions of higher education.[131] The patriotic and socialistic purposes of education are blended in the recently enacted statute on teachers' colleges:

> The study of history based upon acquaintance of the student with the main events, facts, and historical personalities in a chronological sequence, must give students a Marxist-Leninist understanding of historical process and educate them in the love of country and devotion to the soviet regime.[132]

The same statute also shows a change in the attitude toward religion. Thus, the statute on secondary schools enacted in 1934 definitely called for active combat of religion:

> 13. The teaching of any form of religious worship, as well as performance of any rites or rituals of a faith, and any other form of religious influence upon the growing generation, shall be prohibited and prosecuted under the criminal law.
>
> The primary schools and secondary schools shall secure an anti-religious upbringing of the students and shall build instruction and educational work upon the basis of an active fight

[129] Coeducation was ordered by the U.S.S.R. Council of People's Commissars to be discontinued in these schools beginning September 1, 1943. Teachers' Gazette (in Russian), August 7 and 11, 1943.

[130] R.S.F.S.R. Laws 1944, text 48.

[131] U.S.S.R. Laws 1940, text 637. See also Chapter 2, note 76.

[132] R.S.F.S.R. Laws 1944, text 41 at 111.

against religion and its influence upon the student and adult population.[133]

The statute on teachers' colleges of 1944 treats the same problem in a much less militant manner. There is no general statement on the atheistic purposes of education, and it is only in connection with the teaching of natural science that it is suggested that "the study of natural sciences must secure the development in the student of a dialectic-materialistic view of nature (origins of life on the earth, origin of animals and plants, origin of men)." [134]

Another feature of present-day secondary education in the Soviet Union is its militarization. From the fifth through the seventh year of secondary schools the students undergo physical training and from the eighth through the tenth year they are subject to mandatory regular preservice training. The training is combined with the regular curriculum of the school. Trainees are also assembled from time to time in camps for a period of from five to ten days to undergo training under conditions very close to those of a regular military unit.[135]

Moreover, several special military high schools are established to rear boys from the age of ten to become commissioned career officers with all the characteristics of a caste. On the eve of World War II, steps were taken to establish special military and naval preparatory schools. Boys admitted at the ages of fourteen to sixteen were to be taught general and military subjects and trained in military discipline; upon graduation they

[133] R.S.F.S.R. Laws 1934, text 263, Section 13.

[134] R.S.F.S.R. Laws 1944, text 41 at 111.

[135] Voennoe Obuchenie (Military Training) January 3 and 17, February 14, 1947.

were supposed to go to military academies for two or three years to become officers.

On August 22, 1943, the establishment of ten additional military schools was ordered, with an average capacity of 500 students each. In honor of the famous Russian general of the eighteenth century, these schools were called "Suvorov Military Schools." On December 1, 1943, the schools were opened. The schools are organized, as the order states, "after the pattern of the former [imperial] Cadet Corps." The boys, primarily the orphans and children of generals and distinguished officers, are admitted at the age of ten years. The purpose of the school is "to prepare boys for the military service in the capacity of commissioned officers and to give them general education equivalent to that of the secondary school." The course lasts seven years, during which the students must live in dormitories under conditions approximating those in military barracks. These schools do not take the place of the numerous military academies which train adolescents to become officers upon graduation, but are established in addition to these to serve as preparatory schools. In 1943 the first four classes were opened and boys from ten to thirteen years of age were taken.[136]

5. Church

In general, a change in attitude toward the church and particularly, the Russian Orthodox Church, took place in 1941. Although the laws and decrees restricting religious activities were not repealed, the policy has

136 "Joint Decision of the Soviet Government and the Central Committee of the Communist Party Concerning Rehabilitation of the Liberated Regions," Title X, Krasnaia Zvezda (Red Star) August 22, 1943, also December 1, 1943.

changed considerably. For the first time since the Revolution, namely in 1942, a high dignitary of the Russian Orthodox Church, Bishop Nicholas of Kiev and Galicia, was appointed to serve on a governmental body—the committee for investigation of German atrocities [137]—his ecclesiastic rank being officially mentioned in the order of appointment. On September 5, 1943, Stalin received Sergius, the *Locum Tenens* Patriarch, with two other metropolitans and gave permission to hold a Council of Bishops for the election of Patriarch. Such council convened and elected Sergius the Patriarch of all Russia. After the death of Sergius, on May 15, 1944, another council convened on January 31, 1945, and elected Alexis the new Patriarch. Thus, the Russian Orthodox Church is officially recognized, and on several occasions its leadership has expressed loyalty to the soviet government and gratitude for its benevolent attitude, and has given full support in the fight against Hitler. A governmental committee in charge of ecclesiastic matters involving the Russian Church was created in October, 1944, although no official act to this effect was printed in the official collection of laws and decrees. The opening of a theological seminary has been announced. However, the legal status of the Church cannot be adequately ascertained, because all these steps have not been followed by any officially promulgated acts, either repealing the restrictive provisions of the Constitution, and especially the Law of 1929 governing religious bodies, or enacting new provisions (see Volume II, Nos. 18–21).

[137] November 2, 1942, Vedomosti 1942, No. 40.

III. Conclusion. Recent Changes Evaluated

All these changes in the ideological treatment of many problems and in legislation affecting the private life of soviet citizens show clearly that many old values have been rediscovered and certain old legal institutions restored in the Soviet Union. Love for one's country, veneration and glorification of its past and of the heroes of the past as the background of public life, family, and inheritance, are fully legalized, protected, and sponsored by law. No legal restriction is imposed upon private ownership of properties serving immediate needs and personal comforts. Certain security granted in respect to the tenure of houses and land, affords some substitute for ownership. The profit motive is recognized as a legitimate incentive to the business efficiency of an individual, provided his activities fit the economic framework designed by the government. Inequality in remuneration according to personal contribution is the cornerstone of the economic system, and the economic inequality resulting from it is not considered unjust. Inequality in social standing and the beginning of the formation of caste-like groups is also in evidence.

There is, however, no change in the main social objectives of the soviet regime. Soviet laws and administrative practices continue to be designed to place the government in full control of national economy and to retain the monopoly of the Communist Party over political and social activities. The entire spiritual life of the country still remains a governmental matter. The free and fair play of economic and political forces is precluded as resolutely as ever. Neither the economic autonomy of the individual nor political liberty belong to the rediscovered values. Democracy as professed and

practiced in the Soviet Union remains essentially different from the Western concept. The sphere of protected rights is restricted, the boundary line between the permissible and the prohibited is closely watched, and the penalties visited upon the transgressors are severe.

The recent changes do not signify a retreat from major objectives, but rather the abandonment of methods proved to be inexpedient. Being reared in the Marxian materialist philosophy, the soviet leaders regarded certain ideologies as a mere by-product of the capitalist mode of production and expected them to vanish with the abolition of private ownership of the means of production, the mainstay of capitalism and the "cause producing class difference and exploitation." [138] Even the common weaknesses and vicissitudes of human nature were, for the communist, products of capitalism destined to disappear in the new social order. But human nature displayed the persistence of its characteristics. "Egotism, indifference, laziness, and cowardice," *Pravda* observed in 1936, "will survive the abolition of the subdivision of society into classes by which they were produced." [139] Many of the communist leaders came to think that for the achievement of the ultimate goal, "our communist task must be directed towards the making over of man." [140] However, recent changes show that this method of preparing the society of the future has been abandoned. Without attempting the making over of men, the present program aims to make socialism fit more closely the demands of human nature, and to reconcile the historic tradition with com-

[138] Resolution of the XVIth conference of the Communist Party quoted from Rezunov, The Soviet State and Socialist Society (in Russian 1934) 5.

[139] Pravda, Editorial April 7, 1936.

[140] Komarov "Abolition of Classes" (in Russian 1936) Soviet State No. 3, 11.

munist aims. This trend originated on the eve of World War II and continued throughout it. But as soon as the war was over the indications of a reverse trend appeared, being inaugurated by the Resolution of the Central Committee of the Communist Party of August 14, 1946. The resolution, a speech by Zhdanov delivered on November 6, 1946, and several articles in *Bolshevik,* exposed inimical ideological tendencies in the modern soviet belles-lettres, theater, movies, and social sciences, including jurisprudence, and called for better indoctrination in communism.

> The new period in the life of the soviet nation enhances with a special force the task of education of the masses in the spirit of communist ideology and the struggle against the survivals and influences of inimical ideology.[141]

Several of the most popular writers, editors, and producers were accused of falling prey to inimical ideology and their work was suppressed. The soviet legal writers were also scorned although in a more general and less definite way. The implication of the present trend for soviet jurisprudence will be discussed after the survey of its previous stages is given in Chapters 5 and 6.

141 (1946) Bolshevik (in Russian) No. 9, 5, also Nos. 15 and 21.

Chapter 5

The Soviet Concept of Law in General

I. Beginnings

1. Introductory

The variety of principles to be found in modern legal systems may be reduced to two chief methods of legislation and legal reasoning: the method of codified statutes, employed in Continental European countries or, as we usually call them, the countries of civil law, and the method of the common law.

For one trained in the civil law tradition, the statute is the basic source of law and the final authority. He interprets the statutory law in accordance with rules developed through learned doctrine, a tradition of legal reasoning that may be traced back to the law of Rome. For him, court decisions are not a body of case law but merely a collection of interpretations of the true meaning of the statutory provisions, which, at least in theory, cannot be challenged but must be followed by the courts. He takes these interpretations as a guide, but they are not, strictly speaking, binding. Behind the entire legal system stands the body of legal theory, whether referred to by the statute or not.

This approach of the civil law lawyers may be contrasted with the high authority of judicial precedents in the doctrine of *stare decisis* and the related principles of the common law. Case law appears not merely the important source of law but is also the means by which

the interpretation of the statute is fixed. Here the statutory provision has to go through a test in court to be established as law. It is of interest to inquire whether the soviet legal system is to be classed with one or the other type, or is *sui generis*.

2. Early Soviet Attitude Toward Law

There were no common-law lawyers among the framers of soviet laws and soviet judges; the only legal system known to them was the civil law. However, there was no desire on the part of the soviet jurists to join any legal tradition. The soviet leaders have candidly admitted that, when they seized power in 1917, they had no definite idea on the status and operation of law under their rule.[1] As a matter of fact, the first decrees of the soviet government were not designed to possess serious binding force, even in the eyes of their authors. They were, according to the definition of Trotsky, "the program of the Party uttered in the language of power" and, as such, "rather a means of propaganda than of administration."[2] In 1917, Lenin thought:

> It does not matter that many points in our decrees will never be carried out; their task is to teach the masses how to take practical steps. . . . We shall not look at them as at absolute rules to be carried out under all circumstances.[3]

No less contemptuous was the attitude of many soviet jurists towards law and legal formulas (see *infra*, II, 1). However, the desire to see the new social order established pressed the recognition of law as a potent instrument in reaching the goal. The immense diversi-

[1] Stuchka, 1 Course 36; Goikhbarg, Economic Law (in Russian 3d ed. 1924) 6; Krylenko, The Judiciary of the R.S.F.S.R. (in Russian 1923) 203; Vyshinsky, 1 Course (2d ed. 1936) 171 *passim*.

[2] Trotsky, 2 My Life (Russian ed. 1930) 65.

[3] Lenin, 16 Collected Works (Russian 1st ed. 1924) 149.

fication of practice in the execution of the orders of the central government was a too obvious menace, especially in the face of armed rebellion of the populace and foreign intervention. After some experience in government, Lenin changed his attitude toward law and stated in 1919 that, "in order to put an end to Denikin and Kolchak [commanders of the anti-bolshevik armies], it is necessary to observe strictly our revolutionary order, to observe religiously the statutes and instructions of the soviet government, and to see that they are observed by all."[4] With the same aim, the Decree of November 8, 1918, provided as follows:

> To call all the citizens of the Republic, all authorities and officers of the soviet government, to a strict observance of the laws of the R.S.F.S.R. and the enactments, resolutions, statutes, and ordinances issued by the central government authorities . . .[5]

Thus, to the soviet decrees was attached a binding force which, nevertheless, did not imply the supremacy of law as a principle. The same decree stated also that "measures not complying with the laws of the R.S.F.S.R. or exceeding them are allowed," if they are "provoked by the extraordinary circumstances of the civil war and the combat of counterrevolution." Since the combat of counterrevolution in one form or another was thus far not a transitory emergency measure but a paramount proposition, this clause of the decree justified arbitrary departures in individual instances from a strict observance of law. Thus, this decree was the first manifestation of two divergent trends that are constantly evident in the soviet jurisprudence. These are the recognition of the full authority of law, or rather, of statutory

[4] Lenin, 24 Collected Works (Russian 2d ed. 1926) 433–434.
[5] R.S.F.S.R. Laws 1917–1918, text 908.

legislation, on the one hand and the admittance of executive freedom and extralegal considerations on the other.

The soviet theorists and practitioners, while never defining the situation in so many words, sought new ideas and new terms in determining the specific role of law in the soviet State. Instead of an outright recognition of the full authority of the soviet law, the principle of "revolutionary legality" was declared (*Revolutsionnaya Zakonnost* in Russian, translated also "revolutionary enforcement of law" or "revolutionary observance of law"), and the decree quoted above is regarded as the first expression of this principle. However, in too many instances so-called "revolutionary expediency" was upheld against "revolutionary legality." Finally, at the beginning of the soviet regime, the courts had been instructed to follow the dictates of a "socialist concept of law" or "revolutionary concept of law" in rendering their decisions. Thus, these three unusual terms were designed to express the new, specifically soviet principles of the operation of law. Let us now analyze what they mean in the eyes of soviet jurists and in practice.

3. The Revolutionary Concept of Law

In the early days of the soviet regime, all the pre-soviet administrative authorities, the agencies of the central government as well as the democratically elected organs of municipal and other local self-governments (*Zemstvo*), were dissolved. The local soviets took their place.[6] Decree No. 1 on the Judiciary of December 7, 1917 (November 24, old style calendar), dissolved all

[6] R.S.F.S.R. Laws 1917–18, texts 5, 180.

the hitherto existing judicial institutions *en bloc* and set up a restriction, though moderate, on the application of the old laws. The newly created people's courts were instructed to apply "the laws of the overthrown governments only insofar as they were not abrogated by the Revolution and did not contradict the revolutionary conscience and revolutionary concept of law."[7] However, the compilers of the decree were aware of the fact that no definite concept of law would be in the mind of coming soviet judges,[8] so a note was added to this section, explaining that those old laws "are considered abrogated" which contradict the decrees of the central organs of soviet power (the Central Executive Committee of the Congress of Soviets and the Council of People's Commissars) and the "program-minimum of the Russian Social-Democratic Party and Party of Socialist Revolutionaries."[9]

For obvious reasons, the next decree on the judici-

[7] R.S.F.S.R. Laws 1917–18, text 50, Section 5:

The local courts shall decide cases in the name of the Russian Republic and shall be guided in their decisions by the laws of the overthrown governments only insofar as these laws are not abrogated by the Revolution and do not contradict the *revolutionary conscience* and the *revolutionary concept of law.*

Note: All laws contrary to the decrees of the Central Executive Committee of Soviets of the Workers', Soldiers', and Peasants' Deputies and the Workers' and Peasants' Government, as well as to the program-minimum of the Russian Social Democratic Party and the Party of Socialist-Revolutionaries, are deemed abrogated.

[8] Stuchka, 1 Course 37. Professor Reisner, a prerevolutionary exponent of Marxism in law, claimed to be responsible for the reference to the revolutionary concept of law in Decree No. 1 on the Judiciary. Reisner, Law, Our Law, Foreign Law, Common Law (in Russian 1925) 21. He asserts that he inspired Lunacharsky, the Commissar for Education, who simultaneously with the decree published an article, "The Revolution and the Court," in Pravda (1917) No. 193, in which he advocated the idea of the creative power of legal conscience with reference to the non-Marxian legal writers, both Russian (Petrazicki) and German (Jellinek, Anton Menger, Knapp).

[9] R.S.F.S.R. Laws 1917–18, text 50, Section 5, quoted *supra*, note 7.

ary, issued in February, 1918,[10] omitted the reference to the "program-minimum." This program contained a declaration of principles of advanced democracy, some of which, such as universal suffrage and secret ballot, were denied at that time by the soviets. The same decree substituted the words "socialist concept of law" and "concept of law of the working masses" for "revolutionary concept of law." [11] However, the instruction of the Commissar for Justice again referred to "the revolutionary concept of law" as an obvious synonym for "socialist concept." [12]

Finally, the Statute on the People's Courts of the R.S.F.S.R. of November 30, 1918,[13] definitely prohibited the citation of any prerevolutionary law in a court decision. Section 22 of the statute reads:

> When rendering a decision in a case, the People's Court shall apply the decrees of the workers' and peasants' government and, in the absence of an appropriate decree or if a decree is incomplete, the court shall be guided by the socialist concept of law.
>
> Note: Any citation of the laws of the overthrown government in a court decision or sentence is prohibited.

As the acts of the soviet government of that time almost invariably were called "decrees" (*dekret*), this section in fact declared the soviet statutory provisions to be the primary source of law and the "socialist concept of law" an auxiliary source. The formula in a way was reasonable and, except for the word "socialist," was not out of line with the traditional jurisprudence of

[10] Decree No. 2 on The Judiciary, R.S.F.S.R. Laws 1917–18, text 347 (erroneously marked 420 in the 2d ed.), Sections 8, 36.

[11] For purposes of procedure, reference was made to the imperial Judicial Statutes of 1864, and the courts were required to state the reason for which "the court abrogated one or another law as obsolete or capitalist."

[12] R.S.F.S.R. Laws 1917–18, text 597, Section 35.

[13] *Id.*, text 889.

countries where statutory law prevails. It is, after all, a commonplace of jurisprudence that, in applying laws, the judge must interpret them and fill in the lacunae from his notion of what the law is, i.e., must resort to his own concept of justice. Thus, such authority of the judge was definitely recognized under the imperial regime, when the statute was the prime source of law. The imperial courts were prohibited to abstain from rendering a decision if the statutory provisions appeared incomplete, obscure, inadequate, or contradictory, and were directed to base their decisions in such cases on the ground of "the common sense of laws," i.e., a concept of law.[14]

The adjective "socialist" which appears in the soviet formula, announced the platform of the new government but did not amount to an innovation in legal technique. It seems that, in substituting the socialist concept of law for the common sense of laws, as a subsidiary source, the soviet legislators merely took into account the obvious incompleteness of the soviet statutes of that time. To leave a broader scope for the discretion of the judge and to call his attention to the pursuit of new social aims was all that the soviet formula sought. But, though at first sight the soviet appeal to the concept of law (i.e., to the conviction of the judge) as an auxiliary source of law may resemble the doctrine of natural law or the Continental doctrine of free judicial legislation,[15] it was far removed from these doctrines. There

[14] Imperial Code of Civil Procedure of 1864, Sections 10, 11; imperial Code of Criminal Procedure of 1864, Sections 12, 13.

[15] The most advanced expression of this doctrine is to be found in Article 1 of the Swiss Federal Civil Code, where it is stated that the statute must be applied to all those problems for which a solution is offered by the letter of the statute or its interpretation; if the judge cannot find such solution, he must resort to customary law and, in the absence of the latter, the judge must decide the case on the ground of such rule as he would establish if he

was no intention to stimulate the development of a law of judicial precedents, or of a customary socialist law (see *infra*). Nor did the courts actually establish law. The government did not wish the country to be ruled by judicial precedent or custom, but primarily by statute as a means of introducing a new social order. The courts were not designed to be an independent power.[16] The socialist concept of law meant practically the same thing as revolutionary expediency, namely, departure from once-enacted rules for the sake of new revolutionary purposes. The more power the central government gained, the more it wished to be the exclusive guide of all governmental authorities, including the courts, in the achievement of the revolutionary goal.

Consequently, reference to the socialist concept of law as an auxiliary source of law was not retained when an era of codification of law began under the New Economic Policy of 1922. Governmental policies were substituted for the socialist concept of law so far as decisions in civil cases were involved, and the imperial formula was adopted for the rest. The soviet civil courts were instructed by a new Code of Civil Procedure, which is still in force, "to decide cases in conformity with the legislative enactments and decrees of the soviet government in effect, as well as ordinances of the local authorities enacted within their established jurisdictions." [17]

In the absence of a legislative enactment or a decree bearing upon the decision in a case, the court shall decide the case, guided by the general principles of soviet legislation and the general policies of the workers' and peasants' government.[18]

were a lawmaker, being guided by the established doctrine and tradition.

16 See Chapter 7, I.

17 Code of Civil Procedure, Section 3.

18 *Id.*, Section 4.

So far as criminal cases are concerned, reference to the socialist concept of law was omitted altogether in the first soviet Criminal Code of 1922, while in the later 1926 Code, which is still in force, it was mentioned only in connection with selection of punishment. But again, no doctrine or body of rules is attached to the term "socialist concept of law" in soviet criminal justice. It is still used interchangeably with "class point of view" in instances where a nonsoviet jurist would speak of "volition," "discretion of the court," or "the following by the court of certain policies." Thus, after a lengthy discussion, the socialist concept of law was defined by Vyshinsky in 1937 as "the awareness of the necessity to proceed in a manner required by the socialist Revolution and the socialist State of workers and peasants." [19]

The other term, "revolutionary legality," or, as it has been recently called, "socialist legality," is still in use. The legal periodical of the U.S.S.R. Attorney General bears this title. There was vivid discussion of the topic several times in the soviet legal press, and an important law of 1932 mentions revolutionary legality in its title.[20]

4. Problem of Socialist Legality

It may be noted that the term "revolutionary legality" has given rise to well-founded objections, even among the soviet jurists. Professor A. Trainin stated with reason in 1922:

> The law may be liberal or conservative, useful or harmful, but the legality, i.e., the observance of law, cannot be right or left, revolutionary or reactionary. . . . Legality means the attaching of a value to the law and is the same in revolution and in restoration; legality is the observance of law without

19 Vyshinsky, Court and Government Attorneys (in Russian 1937) 47.
20 U.S.S.R. Laws 1932, text 298.

which no regular power can exist, be it bourgeois or proletarian.[21]

To this it may be added that, from the viewpoint of traditional jurisprudence, law binds not only the citizenry but also the government; consequently, such slogans as "legality," "observance of law," or "enforcement of law" would mean the supremacy of law over the discretion of the authorities and of law over the government—in brief, government in accordance with law. Observance of law for the sake of law also implies respect for rights. However, this was not the purpose of revolutionary legality, which term acquired in soviet theory and practice a meaning rather difficult to define because, to use the words of a soviet writer:

> In different stages of proletarian dictatorship, the content of revolutionary legality was subject to change, depending upon the circumstances and forms of the class struggle.[22]

In the early days of the soviet regime, as is evident from Lenin's statement quoted above, obedience of the populace and discipline within the ranks of the government agencies were the original purposes of this slogan. It sought to check the sectionalism of local administration. "Revolutionary legality," commented Lenin, "must be single. Legality cannot be one in Kaluga province and another in Kazan province; it must be the same for the entire federation of soviet republics."[23] But there was no unanimity among the soviet leaders and theorists on the question whether the law should bind the government and the administrative authorities

[21] A. Trainin, "Revolutionary Legality" (1922) Law and Life No. 6, 6.
[22] Shliapochnikov, "Revolutionary Legality" (1934) Soviet State No. 4, 46; see also Gintsburg, 1 Course 14; also Stalin, Problems of Leninism (Russian 10th ed. 1935) 113.
[23] Lenin, 27 Collected Works (Russian 2d ed.) 298.

in particular. On the one hand Bukharin, at one time the leading theoretician, later executed on a charge of treason, argued at the beginning of the New Economic Policy in 1923 that "Revolutionary legality means an end to any arbitrary administration, including the revolutionary." [24] But in the course of a bitter discussion, which lasted several years, different opinions were also brought forward. Thus, Soltz, a prominent prosecutor, in 1925 advocated:

> We must check the rule of law from the viewpoint of revolutionary expediency, which helps us in our work of reconstructing society along socialist lines. The problem of expediency should predominate over the form of the law.[25]

Others objected that such a maxim might shake the obedience of local authorities to the central government and destroy the latter.[26] But in a later period, in the stormy days of the revival of the drive for socialism, Vyshinsky, then Attorney General, now Deputy Minister of Foreign Affairs, sarcastically rejected the above statement of Bukharin, arguing as follows:

> When we enforce revolutionary legality, we must always consider whether our statutes are in accord with the interests and needs of the proletarian revolution, stressing this side of the matter rather than the formal element, the wording or legal formula.[27]

The same author stated in 1935:

> The formal law is subordinate to the law of revolution. There might be collisions and discrepancies between the formal

[24] Bukharin, The Road to Socialism and the Union of Workers and Peasants (in Russian 1923) 79, quoted from Vyshinsky, Revolutionary Legality (in Russian 1932) 16, (2d ed. 1933) 51.

[25] Izvestiia, November 24, 1925.

[26] Iachontov, "Revolutionary Legality" (in Russian 1926) Soviet Law No. 1 (19), 9–10.

[27] *Op. cit. supra*, note 24.

commands of laws and those of the proletarian revolution. . . This collision must be solved only by the subordination of the formal commands of law to those of party policy.[28]

II. Soviet Theories of Law

1. Marxian Background

The reason underlying this anticipation—that there may be collision between laws enacted by a government brought to power through a proletarian revolution and the revolution itself—apparently is that mistrust of law as an independent social force was deeply rooted in Marxian philosophy as it was originally understood by many soviet jurists. They sought not only to get rid of such traditional institutions as property and inheritance but looked at the legal concepts of any traditional jurisprudence as the expression of a capitalist ideology.[29] New concepts had to be derived from Marxian philosophy as the only ideology of the soviet world. Thus, Goikhbarg, the compiler of the Civil Code, wrote in 1923:

> We refuse to see in law an idea useful for the working class. . . . Religion and law are ideologies of the exploiting classes, and the latter gradually took the place of the former. . . . At the present time, we have to combat the juridical ideology even more than the religious.[30]

Reisner, another Marxian jurist, questioned in 1925:

> We still do not know whether we need law, and to what extent we need it, and whether it is necessary to gild the proletarian dictatorship and the class interest, for no reason at all, with enigmatic juridical symbols and formulas.[31]

[28] Vyshinsky, Judiciary of the U.S.S.R. (in Russian 3d ed. 1936) 32. In the first edition (1934) at p. 24 the wording is slightly different.
[29] Stuchka, The Revolutionary Role of Law and State (in Russian 1921) 3.
[30] Goikhbarg, 1 Economic Law (in Russian 3d ed. 1924) 8, 19.
[31] Reisner, Law, Our Law, Foreign Law, Common Law (in Russian 1925) 29 *et seq.*, 34.

The soviet textbook on civil law of 1934 similarly states:

> Marxism declares a merciless war against the capitalist legal concepts and the dogmatic method in jurisprudence.[32]

However, neither did Marxian philosophy enable the soviet jurists to arrive at a unanimously accepted legal theory, nor were all the traditional legal concepts found to be useless in building up the soviet State and law.

The Marxian background of the communist jurists prompted them to depreciate the importance of law as an independent factor, to regard it primarily as a by-product of economic conditions. According to Marx and Engels, the law, as well as the whole of spiritual civilization, is a "superstructure" erected over the material "basis" that, in their opinion, is formed by the relationships of men in the process of the production of commodities.[33] Economic factors shape and determine the form and content of law. All other elements are characterized as "the political, legal, and other ideological conceptions" through which men become conscious

[32] Gintsburg, 1 Course of Economic Law 42.

[33] "Legal relations as well as forms of the state could neither be understood by themselves, nor explained by the so-called general progress of the human mind, but that they are rooted in the material conditions of life.

"In the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structure of society—the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness. . . . With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed." Marx, Zur Kritik der Politischen Oekonomie (1877), author's preface written in 1859. English translation by N. I. Stone, A Contribution to the Critique of Political Economy (1904) 11, 12, 13.

Society is not based upon law; this is a juridical fiction. Just the reverse is the truth. Law rests upon society, it must be the expression of the general interests that spring from the material production of a given society. Marx's "Speech Before the Cologne Jury" (1849), (1923) Labour Monthly 175.

of the material forces of production and its existing or developing relations. According to Engels, "The jurist imagines that he is operating with *a priori* principles, whereas they are really only economic reflexes." [34]

However, such symbols as "legal superstructure" or "basis," used as an explanation for the connection between economy and law, are substantially metaphorical and not explanatory. In the soviet environment, it was the soviet law which was to change the "economic foundation" of society rather than vice versa. Also, Engels had warned against an oversimplified conception of the "economic foundation" as the only cause and the "legal superstructure" as merely the effect. From his letters written not long before his death, it follows that, though dependent on the economy as the cause and, as such, an effect, law may "react in its turn upon the economy" and thus become the cause.[35] Consequently, the proposition offered as an explanation presented in fact

[34] Engels, Letters of July 14, 1893, September 21, 1890, October 27, 1890, and July 14, 1893, Karl Marx and Friedrich Engels Correspondence, 1846–1895, A Selection (1935) at 482, *cf.* 475, 511 *et seq.*

"In every historical epoch, the prevailing mode of economic production and exchange, and the social organization necessarily following from it, form the basis upon which is built up and from which alone can be explained the political and intellectual history of that epoch." Engels, Preface to Communist Manifesto, dated January 30, 1888, in Essentials of Marx (Lee's ed. 1926) 28.

[35] "It is not that the economic situation is the cause, and the only active one, while everything else is a passive effect. There is, rather, mutual action on the basis of the economic necessity, which always asserts itself ultimately. Engels, *op. cit. supra*, note 34, 517.

"Though the material form of existence is the *primum agens* (primary agent) this does not exclude spheres of ideas from reacting upon it in their turn, though with a secondary effect." *Id.* 472.

The economic situation is the basis, but various elements of the superstructure are in many cases influential upon the course of historical struggle; these elements are: the political forms of the class war and its results, the constitutions established by the victorious class after its victory, etc., legal forms and then even the reflexes of these actual struggles in the minds of the participants, i.e., the political, juridical and philosophical theories, religious ideas and their further development into systems of dogma. *Id.* 475.

a new problem. A Marxist should, according to Reisner, "ascertain the specific relation between the law and the economic basis" [36] or, as Pashukanis states, "offer a materialistic interpretation" of the phenomenon of law.[37]

2. Early Theories of Law: Pashukanis and Others

Several soviet writers made an attempt to develop a constructive theory which would answer these questions. One of the first Commissars for Justice, Stuchka, offered a definition of law which was included in an early soviet penal enactment.[38] In this definition, he actually recast the definition of law by the German legal philosopher, Rudolph von Jhering,[39] in Marxian terms. The soviet theorists, Reisner and Pashukanis, have made a rather exhaustive critical analysis of the definition.[40] It has been occasionally praised by some soviet

[36] Reisner, "Theory of Law by Comrade Stuchka" (in Russian 1922) 1 Vestnik of the Communist Academy of Science 173. See also Stuchka's reply, "Defense of the Revolutionary Marxian Concept of Law" (1923) 3 *id.* 159–169.

[37] Pashukanis, General Theory of Law and Marxism (in Russian 3d ed. 1927) 16.

[38] Art. I. The law is a system (order) of social relations corresponding to the interests of the ruling class and protected by the organized force of this class (the State). "Fundamentals of the Criminal Law of the R.S.F.S.R.," R.S.F.S.R. Laws 1919, text 590, Section 1; Stuchka, 1 Course 12. See also *op. cit. supra,* note 29.

[39] Stuchka, Thirteen Years of Struggle for the Revolutionary Marxian Theory of Law (in Russian 1931) 2.

Jhering defined "law with reference to its contents as the form of security of the conditions of social life procured by the power of the State." Jhering, Law as a Means to an End (Husek's tr. 1923) 330.

[40] They contended that Stuchka's definition does not indicate any specific criteria of law as distinguished from other social relations. If it is true that law is "a system of social relations," what is the specific characteristic of this system? Without an answer to this, they argued, the whole definition sounded like a tautology: law (social relations) means social relations. *Cf.* Pashukanis, General Theory of Law (in Russian, 3d ed. 1927) 15–17, 39 *passim.* Reisner, "Theory of Law by Comrade Stuchka" (1922) Messenger of the Communist Academy, No. 1, 173; *id.* Law, Our Law, Foreign Law, Common Law (in Russian 1925) 21, 37 *passim.* Again Reisner

writers for its "class point of view" but otherwise has fallen into oblivion. Further reference thereto is hardly needed for the study of present soviet law.

The teachings of Pashukanis, on the contrary, cannot be omitted because, until his fall in 1937, he was a recognized authority on the soviet theory of law. His writings represent the most daring attempt to create a Marxian theory of law. They gained a distinct following and, in the words of the recent soviet textbook, "The destructive 'ideas' of Pashukanis found direct repercussion in a series of studies of soviet civil law." [41]

Pashukanis started with the proposition that rights are postulates of law:

> The rules of law differ from those of esthetics, ethics, and rules of human conduct dictated by bare utility, in that the rules of law presuppose a person who is endowed with rights actively claimed. . . . Conflicting private interests are the basic postulate of legal regulation. . . . On the contrary, unity of purpose is the postulate of technical regulation. . . . The legal order differs from every other social order precisely for the reason that it is intended for private individuals.

Thus, law appears to adjust the conflicts of private interests. Private law, civil law, is the original sphere

correctly pointed out that the protection of the interests of the ruling class does not constitute any specific criterion of law. On the one hand the protection of the interests of the dominant economic class is not necessarily secured by law, and on the other hand the interests of such a class are not the only interests protected by law. A given law does not cease to be the law even if it protects the interests of the oppressed classes, e.g., the labor legislation of the capitalist countries; or if it pertains to a neutral sphere, e.g., public health or traffic regulations. Thus, according to Professor Reisner, though any law is a class law in that it represents an ideology of a class or group, it is not necessarily the law of the ruling class. Nor does it operate to protect the governing class. Law is a compromise "made of odds and ends of the ideas of various classes, a multicolored tissue which is created on the basis of the legal demands of various social classes." The soviet law was, according to him, the co-existence of the bourgeois class law, the proletarian class law, and the peasant class law. *Op. cit.* 21, 37, 184, 198, 244, 274. See Gsovski, "The Soviet Concept of Law" (1938) Fordham L. Rev. 8 *et seq.*

[41] 1 Civil Law Textbook (1938) 39–40.

of law; thence, it penetrates into public life. However, there is a limit to the penetration because:

> As an organization of class domination or an organization for war, the State neither requires, nor really admits legal interpretation. At that point begins the sphere where the so-called *raison d'état,* that is to say, the principle of pure expediency, becomes supreme.

This is the realm of authoritarian regimentation and obedience, distinct from that of law:

> The idea of absolute obedience to some external authority establishing rules (a norm-creating authority) has nothing to do with law.[42]

This distinction is obviously derived from the prerevolutionary masters of legal thought, Korkunov and Petrazycki (Russians) and Jellinek and Laband (Germans).[43] But from this, Pashukanis develops what he

[42] Pashukanis, *op. cit.*, note 37 at 37, 55, also 36, 41, 51–60, 90.

[43] Korkunov:

> Rules of law establishing rights and duties must be distinguished from technical rules, which, even when they come from the government and are compulsory, are only intended to show the best means of achievement of the objective. . . . Rules of expedience would exist even if human interests were not varied and conflicting . . . even if there were only one human being in the world. Technical rules might exist even then, but law would be out of question. . . . Law necessarily presupposes relationships of various interests of several free persons. Korkunov, The Ukase and the Law (in Russian 1894) 236–237.

Laband:

> Law consists in delimitation of the rights and duties of particular persons as against each other; by its nature law presupposes the existence of many persons who may encounter one another. Laband, 2 Das Staatsrecht des Deutschen Reiches (1911) 181.

Jellinek:

> Any law is a relationship between individuals endowed with rights. . . a rule is law if it delimits the sphere of the free activities of persons. Jellinek, Gesetz und Verordnung (1887) 195; see also *id.* 215, 240.

The influence of Korkunov, Laband, and Jellinek upon Pashukanis and other soviet legal writers is shown by Dobrin, "Soviet Jurisprudence and Socialism" (1936) 52 L.Q.Rev. 402 *passim.* For the influence of Petrazycki, see Gsovski, *op. cit.* 10. A splendid monograph on Petrazycki in English was published by H. W. Babb, "Petrazhitskii" (1937) 16 Bost. U. L. Rev. 793.

calls the Marxist economico-materialistic explanation of the origin of rights.

The idea of rights, and consequently of law, appears in the popular mind when exchange of commodities and production for market develops. In order to effectuate exchange, men must appear on the market as owners of commodities, equally authorized to dispose of them freely. Moreover, the parties to a concrete act of exchange give and receive in turn equivalent values. Hence, the idea of a contract as a free agreement of wills comes from barter upon the principle of value for value and is, therefore, not a manifestation of justice, but a bare economic necessity. The old doctrines were mistaken in deducing such concepts as legal capacity or rights from the idea of the value of a human being. The postulates of law, the ideas of an abstract individual endowed with rights and of men equal in the exercise of their rights, are produced by economic experiences.[44] Pashukanis concluded that:

> Only capitalism creates the conditions necessary to enable the juridical element to obtain its highest development in social relations. . . . When the whole economic life is based on the principle of the free agreement of wills, then every social function in some way or other obtains a legal characteristic, that is to say, becomes not a mere social function, but the right of him who exercises the function.[45]

3. "Withering Away" Doctrine

To the question what is the value of law under a regime transitional to communism, Pashukanis replied as follows:

> The withering away of the categories of bourgeois law (just

[44] Pashukanis, *op. cit.*, note 37, at 9, 42, 19, 23, 69 *passim*, 113. Compare with Marx, 1 Capital (tr. by Untermann 1906) 96–97.

[45] *Id.* 19, 57, also 7, 71.

the categories, and not this or that particular rule) can under no circumstances mean their replacement by some new categories of proletarian law.

This meant to Pashukanis:

> The withering away of law in general, that is, the gradual disappearance of the juridical element from human relations . . . Ethics, law, and State, are the forms of a bourgeois society. If the proletariat is forced to use them, it does not mean that there is a possibility of further development of these forms by way of filling them with a socialist content. They are not adapted to embrace this content and shall wither away gradually with the realization of socialism. Nevertheless, in the transition period, the proletariat must use in its own class interests these forms inherited from bourgeois society and thereby exhaust them. . . . The proletariat must take a sober and critical attitude not only toward the bourgeois State and ethics but also toward its own proletarian State and ethics, i.e., must apprehend the historical necessity of their coming into being and their disappearance.[46]

The same view was expressed in the soviet decree of 1919 on criminal law before Pashukanis' writings appeared. It was there stated that, with the advent of communism, "the proletariat shall destroy the State as an organization of coercion and law as a function of the State."[47] Then there will be no classes, no State, and no law. "Communism means," wrote Stuchka in 1927, "not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests, law will disappear altogether."[48]

[46] *Id.* 22, 104–105.

[47] R.S.F.S.R. Laws 1919, text 590, Preamble.

[48] 3 Encyclopedia of State and Law (in Russian 1925–1927) 1593. Here is a later presentation of the same view by a minor writer: "The State and the law are phenomena of a society divided into classes. Therefore, the abolition of classes, the transition from a class society to a classless society, means the final withering away of the State and the law in the higher phase of communism." Aleshin, "Soviet Law and the Building Up of Socialism" (1932) Soviet State No. 5/6, 51.

So the doctrine of the "withering away" of law with the advent of communism was not Pashukanis' original idea. It was rather a further step in the development of the well-established Marxist thesis of the "withering away" of the State in a communist society. Thus, Engels expected that by a communist revolution:

> The proletariat seizes political power and converts the means of production into the property of the State. But by this very act it will abolish itself as proletariat and all class differences and antagonisms, and with this also, the State.[49]

Similarly, Marx thought:

> The working class will put, in the course of development, such an association in place of the old bourgeois society as will exclude classes and their antagonisms; then there will be no political power in the proper sense, because political power is just the official expression of the class antagonisms within capitalistic society.[50]

In the eyes of Engels, such disappearance of the State and government[51] was regarded as the immediate result of the social revolution:

> The first act, by which the State will act as a representative of society—the assumption of control over the means of production on behalf of society—will be at the same time its last independent act as a State [government] . . . The State will not be abolished; it will wither away . . . A new

[49] Engels, "Dell 'autoritta" 32 Neue Zeit I, 32. English tr. as Socialism, Utopian and Scientific (1902) 75.

[50] Marx, Misery of Philosophy (German ed. 1885) 182, English tr. in Lenin, State and Revolution (1919) 27. See also Communist Manifesto: "When . . . class distinctions have disappeared . . . the public power shall lose its political character." Essentials of Marx (Lee ed. 1926) 53.

[51] It may be remarked that it is somewhat uncertain whether Marx and Engels use the word "State" (*der Staat, l'état*) to denote the nation as a separately existing body politic or as the governmental machinery. It seems, however, that this term is used to indicate both, because the Marxian philosophy is offered as an international plan, and hence the individually existing national states were supposed to merge in an international association of classless societies. Thus, the proposition of the "withering away of the State" apparently implied both the merger of national states and the end of government within the states.

society organized on the basis of a free and equal association of producers will banish the whole machinery of the State where it will then belong—to the Museum of Antiquities by the side of the spinning wheel and the bronze ax.[52]

However, Lenin modified the meaning of "withering away of the State" by the following interpretation:

The bourgeois State does not "wither away" according to Engels but will be "abolished" by the proletariat in the course of revolution. It is the proletarian State or rather semi-State which will gradually wither away after this revolution.[53]

4. "Withering Away" Doctrine Condemned

The theory of "withering away" of the State and the law was no longer of an academic nature when, in 1930 the First Five-Year Plan was in operation with the goal "to create the economic base for the abolition of classes in the U.S.S.R. and for the construction of a socialist society."[54] Should the "withering away" of the proletarian State or semi-State begin step by step with the achievement of this plan, e.g., should not the village soviets, the lowest administrative agencies, be dissolved and replaced by purely economic management of collective farms, as some communists suggested?[55] Such logical conclusions from theoretic speculations were not admitted by the soviet leaders. The thesis of the withering away of the State received a new interpretation at this time by Stalin:

Some of our comrades understood the theses about the abol-

[52] Engels, Origin of Family, Private Property, and the State (Engl. tr. by Untermann, Chicago 1902) 211–212; *id.*, Anti-Dühring (German ed. 1878) 234, Engl. tr. Socialism, Utopian and Scientific (London 1892; Chicago 1902) 16.

[53] Lenin, State and Revolution (in Russian 1931 ed.) 39.

[54] Stalin. "The Results of the First Five-Year Plan," Problems of Leninism (English ed. Moscow, 1940) 409.

[55] Rezunov, Marxism and the Psychological School of Law (in Russian 1931) 9; Aleshin, see *supra*, note 48.

ishment of classes, the creation of classless society, and the withering away of the State as justification of laziness and good nature, as justification of a counterrevolutionary doctrine of extinguishment of the class war and weakening of the governmental powers. Is it necessary to state that there is no place for such in the ranks of our Party? . . . The abolition of classes will be achieved not by extinguishing the class war but through its intensification; the State will wither away not through making the governmental power weak, but by strengthening it to the utmost.[56]

On a previous occasion, Stalin stated:

> We are in favor of the State withering away and at the same time we stand for the strengthening of the dictatorship of the proletariat, which represents the most powerful and mighty authority of all forms of the State which have existed up to the present day. The highest possible development of the government power with the object of preparing conditions for the withering away of the government power, this is the Marxian formula. Isn't it "contradictory"? Yes, it is, but this contradiction is a living thing, and completely reflects the Marxian dialectic.[57]

Thus, the withering away of the State, though not stricken out of the program, was indefinitely postponed. The doctrine of the withering away of law was even more categorically condemned.

The new Constitution, proposed in 1935 and now in force, announces that "the economic foundation of the U.S.S.R. consists in socialist economy" (Section 1), creates the office of federal Attorney General for the "supervision of the strict execution of the laws," and devotes a chapter to the "rights and duties of citizens."[58]

Pashukanis himself then disavowed his theory and wrote in March, 1936:

> All talk about the withering away of law under socialism

[56] Stalin, *op. cit.* 437, also *id.* (Russian 10th ed. 1935) 509.
[57] *Id.*, Speech of June 27, 1930, *op. cit.* (Russian 10th ed. 1935) 427.
[58] 1936 Constitution, Sections 112, 114, and Chapter X.

is just opportunistic nonsense, like the allegation that the governmental power begins to wither away the next day after the bourgeoisie is overthrown.[59]

The belated self-criticism did not save Pashukanis' theory and his followers. In January, 1937, a campaign in *Izvestiia* and in the legal press was opened, demanding a "purge" on the front of legal theory. "The citizens of the Soviet Union must be sure of the firmness of the soviet law," according to the editorial in *Izvestiia*.[60] Vyshinsky, then Deputy Attorney General and prosecutor in the latest purge cases, the author and editor of several standard books on soviet law, now Deputy Minister of Foreign Affairs, gave the following characteristics of the Pashukanis "school":

> They [Pashukanis and his followers] preached anti-Party subversive "theories" of withering away of the State and law. To disarm the working class in front of its enemies, to undermine the might of socialism—that was the aim of these attempts. To the students, the growing *cadres*, a nihilistic attitude toward the soviet law was suggested.[61]

A conference of legal theorists was convoked in July, 1938, to hear a lengthy report by Vyshinsky criticizing all the work done in the legal field thus far and outlining new tasks:

> Soviet theory of law and the State must afford a system

[59] Pashukanis, "State and Law under Socialism" (1936) Soviet State No. 3, 7.

[60] Izvestiia, No. 115, March 17, 1937. Vyshinsky, "Stalin's Constitution" (1936) Socialist Legality No. 8, 16. "And now more than ever before there is a need for stability of laws." Stalin, Speech at VIIIth Congress of Soviets, Stalin, Problems of Leninism (English ed. 1940) 586; see also Pashukanis, "Stalin's Constitution and Socialist Legality" (1936) Soviet State No. 4, 23, 25.

[61] Vyshinsky, "About the Situation on the Front of Legal Theory" (1937) Socialist Legality No. 5, 31. See also Antonov-Saratovsky, "On Some Methods of Wrecking on the Juridical Front," Izvestiia, May 8, 1937, No. 107; Yudin, "Against Confusion, Ridiculousness, and Revisionism," Pravda, January 20, 1937.

of soviet socialist principles which explain and determine the socialist content of soviet legal doctrines and legal institutions.[62]

Although dogmatic jurisprudence was criticized primarily for treating legal problems separately from economic and social relations, its purely technical heritage was not to be rejected:

> Marxism-Leninism requires that the proletariat virtually master the old culture, the old science.[63]

Vyshinsky denied that law reaches its "highest point of development under capitalism," as once asserted by Pashukanis. On the contrary, he says:

> The process of the development of a capitalist society is connected with the process of its decay, and this is connected with the destruction, one may say, the shooting down, the demolition by the bourgeoisie of its own legality, its own law . . . Only in a socialist society does law acquire a firm soil for its development.[64]

Marxism must remain the chief guide, a "compass," but new passages in the works of Marx, Engels, and Lenin were brought to light and interpreted to show that they admitted the necessity of a socialist law and rights in a socialist state.[65]

5. Current Analytic Theory: Vyshinsky

At the same time, Vyshinsky offered a general definition of law which is worth quoting because it was repeated in 1945 in the *Bulletin* of the Legal Section of the Academy of Science and, thus, seems still to be generally accepted. It reads:

62 Vyshinsky's speech, reported in Basic Tasks of the Science of Soviet Socialist Law (in Russian 1938) 27.

63 *Id.* 20.

64 *Id.* 30.

65 E.g., Vyshinsky, "Marx's Treatment of the Problems of Law and State" (1938) Soviet State No. 3, 13 *passim.*

Law is a general body of such rules of conduct expressing the will of the ruling class as are established by legislation, and of such customs and rules of community life as are sanctioned by the government power, the application of which body of rules is secured by the coercive force of the State for the protection, consolidation, and development of the social relations and the public order, beneficial and desirable for the ruling class.[66]

This definition is at variance with those to be found in nonsoviet jurisprudence in the assumption that law expresses the will of and is for the benefit of the ruling class. Yet this assumption is by no means described as an essential element of a rule of law. The definition clearly emphasizes that a rule "expressing the will of the ruling class" or "beneficial or desirable for such class" does not become a rule of law by virtue of these characteristics alone. To be regarded as law, such rule must be "established by legislation" or "sanctioned by the government," or its application must be "secured by the coercive force of the State." In the 1944 textbook on civil law this definition appears even in a simpler form, as follows:

> Law is a body of rules of human conduct established or sanctioned by the government power, the execution of which rules is secured by the coercive power of the State.[67]

There is no substantial difference then from the definitions of law given by the representatives of analytical jurisprudence: e.g., Holland's idea of law as "a general rule of external human action enforced by the sovereign political authority";[68] Pollock's "the sum of rules of

[66] Vyshinsky, *op. cit.*, note 60 at 37; Vyshinsky, editor, The Soviet Constitutional Law (in Russian 1938) 53; "The Science of Law Within the System of the Academy of Science" (1945) Bulletin (Izvestiia) of the Section for Economics and Law of the U.S.S.R. Academy of Science No. 3, 4.

[67] 1 Civil Law (1944) 67; Golunsky, Theory 154.

[68] Holland, Jurisprudence (13th ed. 1924) 40.

justice administered in a State and by its authority";[69] Anson's "rules of conduct defined by the State as those which it will enforce, for the enforcement of which it employs a uniform constraint."[70]

Thus, the soviet jurists arrived at a concept of law that had been clearly stated before by the representatives of nonsoviet analytical jurisprudence. The concept points out one essential meaning of law. But as has been so admirably shown by Roscoe Pound, the term law is used in modern jurisprudence also in other senses no less substantial, which he reduces to three: legal order, aggregate of laws, and judicial processes.[71] Other writers stress the fact that by law

69 Pollock, First Book of Jurisprudence (1896) 17.

70 Anson, 1 Law and Custom of the Constitution (1886) 8. See also:

Clark: " . . . the rules and principles recognized and *applied* by the State's authorities, judicative and executive." Clark, 1 Roman Private Law: Jurisprudence (1914) 75.

Austin: "Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or independent political societies . . . To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied." Austin, The Province of Jurisprudence Determined (1832) 2.

Markby: " . . . a general body of rules which are addressed by the rulers of a political society to the members of that society, and which are generally obeyed." Markby, Elements of Law (1871) Section 9.

71 "The term 'law' is used in three senses which it is important to distinguish: (1) one sense is the *legal order* . . . the régime of ordering human activities and adjusting human relations through the systematic application of the force of politically organized society . . . (2) The oldest and longest continued use of the term 'law' is to mean the *aggregate of laws*—the whole body of legal precepts which obtain in a given politically organized society; the body of authoritative grounds of or guides to judicial and administrative action, and so of predicting such action, established or recognized in such a society . . . (3) In a third sense 'law' is used to mean what we may better term, with Mr. Justice Cardozo, the *judicial process*, the process of determining controversies, as it actually takes place in the courts, and also as we conceive it ought to take place. To this today we must add *administrative process*—that of administrative determination by boards and commissions and administrative officers, whether as it actually takes place or as it is conceived it ought to take place." Roscoe Pound, The History and System of the Common Law, Vol. I, National Law Library (1939) 4, 5.

is meant rules ultimately enforced by the courts of justice,[72] and point out that law implies its predictability,[73] has an inner binding force,[74] and serves primarily the purpose of settling disputes among free and equal individuals.[75]

Overlooking all these meanings of law, the soviet definition characterizes law by its service to the ruling

[72] Compare Gray: "The law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties." Gray, The Nature and Sources of Law (2d ed. 1927) 84. Salmond: "The law may be defined as the body of principles recognized and applied by the State in the administration of justice." Salmond, Jurisprudence (7th ed. 1924) Section 15, 39. "The rules recognized and acted on in courts of justice." *Id.* (1902) Section 5. See also Llewellyn, The Bramble Bush (1930) 3.

[73] Holmes: "The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457, 460, at 461. Cardozo:

"A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged . . ." Cardozo, The Growth of the Law (1924) 52. See also Frank, Law and the Modern Mind (1930) 274 note.

[74] Petrazycki, Introduction to the Study of Law (in Russian 1st ed. 1905, 2d. ed. 1907, 3d. ed. 1908); *id.*, Theory of Law and State in Connection with a Theory of Ethics (2 vols., 1st ed. 1907, 2d. ed. 1909–1910). Petrazycki sought to establish a psychological criterion of legal rules as distinct from bare force, ethical rules, and rules of social etiquette. According to Petrazycki, law arises from feelings of right and duty and the inner compulsion attached to these feelings in the human mind. For him, the bonds of rights and duties between individuals are primarily psychological phenomena, special legal emotions of the persons obligated or authorized by law. By force of these emotions, in every action which we consider to be our duty by law, we attribute to somebody the right to demand its performance. A rule of law is, according to Petrazycki, different from a rule of ethics in that the latter is merely an outright imperative, that is to say, a command, while the rule of law is not only imperative but also attributive, that is, it implies a real or imaginary person to whom the authority is attributed to ask the fulfillment of the command. Hence Petrazycki defined law as an "imperative attributive emotion." External coercion is not a criterion of law, according to him, and not the State but the people and their coincidental "imperative attributive emotions" are the source of law. Petrazycki advocated the resurrection of natural law in the form of what he called the "intuitive law." Some phases of Petrazycki's teachings are brilliantly presented in English by Babb, "Petrazhitskii" (1937) 16 Bost. U. L. Rev. 793.

[75] See Korkunov, Laband, and Jellinek as quoted in note 43.

class. This is a tribute to the teachings of the founders of Marxism. Marx, Engels, and Lenin viewed the State and the law as a product of class antagonisms within a society. What will happen then to law if classes are abolished? What is the fate of law in the Soviet Union, which has officially entered the beginning stage of the construction of a classless society? "The whole of the [soviet] national economy has become socialist," stated Molotov in 1936. "In this sense we have accomplished the task of abolition of classes." [76] Therefore, certain soviet jurists objected that the definition of law quoted above "does not fit the law in a classless socialist society," i.e., the soviet law. To these, Vyshinsky replied as follows:

> In a classless socialist society, law expresses the will of all the people, who are guided by the most advanced group of the society and who create their rules for the protection, strengthening, and development of social relations favorable to and desirable for the toilers. . . . The place of the classes is taken by the people, the toilers. . . . However, the dominating interests in a classless socialist society do coincide with the interests of the proletariat in a society divided into classes.[77]

Vyshinsky assumes that the socialist law expresses principles which "completely coincide with the principles of socialist dictatorship and with the interests of the proletariat as a ruling class" in a society still divided into classes. Thus, a dialectical bridge for the transition from a "class concept of law" to a "classless concept of law" is built. The Marxian saying addressed to the bourgeoisie, "Your law is the will of your class given the authority of statute," [78] and Lenin's definition of law

[76] Molotov, The Plan and Our Task (in Russian 1936) 23.
[77] Vyshinsky, "The XVIIIth Congress of the Communist Party and the Tasks of the Science of Socialist Law" (1939) Soviet State No. 3, 10.
[78] "Euer Recht nur der zum Gesetz erhobene Wille Eurer Klasse ist . . ." Marx and Engels, Manifest der Kommunistischen Partei (1848) 6;

as "the expression of the will of the classes which have won the victory and kept the governmental power in their hands," [79] are reconciled with the law as conceived by analytical jurisprudence. The soviet socialist law is then defined as follows:

> Socialist law of the epoch of the termination of the socialist reconstruction and gradual transition from socialism to communism is a *system of rules of conduct (norms) established in a legislative procedure by the power of the toilers and expressing the will of the whole of the soviet people,* which is guided by the working class with the Communist Party at its head for the purpose of the protection, strengthening, and development of socialist relations and the building up of a communist society.[80]

The italicized part of the definition is considered, and undoubtedly in it is to be found, the essential criterion of law as a specific social phenomenon. Its resemblance not only to Pashukanis' views, after he changed his original doctrines, but also to a classic of German nineteenth-century jurisprudence, Dernburg, is obvious. Thus, Pashukanis wrote in 1936: "Law is the most general and most authoritative expression of the will of the socialist nation"; [81] Dernburg defined law in an objective sense as "that order of the relations of life which is secured by the general will." [82]

Marx and Engels, Gesamtausgabe (1932), Abt. 2, 541. The translation of this passage is by the present writer and corresponds to the Russian translation as often quoted by the soviet writers. Published English translations are less accurate. Essentials of Marx (Lee's ed., 1926) 48, reads: "Your jurisprudence is but the will of your class made into a law"; Marx and Engels, Communist Manifesto (Riazanoff's ed., 1935) 47. reads: "Your 'right' is only the will of your class writ large as law."

[79] Lenin, 11 Collected Works (2d Russian ed. 1926–1932) 418.

[80] *Loc. cit. supra,* note 77 (italics supplied).

[81] Pashukanis, "Stalin's Constitution and Socialist Legality" (1936) Soviet State No. 4, 24, 27.

[82] Dernburg, 1 Das Bürgerliche Recht (3d ed. 1906) 47.

6. Class Point of View Analyzed

It may be observed that the "class point of view," traditional in Marxian writings, has displayed all its vagaries. It has proved to be no guide in the solution of the problem of law. The definition of the soviet law as quoted above still leaves open the question of whether a classless society has been achieved in the Soviet Union. Numerous contradictory statements have been made by the soviet leaders to that effect. The contradictions are a result of the fact that the notion of a social class lacks definiteness. Marx and Engels have never defined what they meant by a "class." Two attempts of Lenin at such definition are known to the writer. One reads:

> What is a class, generally speaking? It is that which enables one part of society to appropriate the labor of the other. If one part of society appropriates all the land, we have the classes of landowners and peasants. If one part has factories and plants, stocks, bonds, and capital, while the other part works in these factories, we have the classes of capitalists and proletarians.[83]

In this sense, undoubtedly, classes are abolished in Soviet Russia. Another definition reads:

> We call classes the large groups of people that are distinctive: by their *place* in the historically established system of national production; by their *relations* to the means of production (in the majority of cases fixed and shaped by laws); by their *role* in the national organization of labor, consequently, by their *method of obtaining* the share of national wealth which they dispose of and by the *size* of their share. Classes are such groups of people, of which one can appropriate the labor of the other owing to the difference in their position in a given system of national economy.[84]

If we consider the criteria given here italicized, a

[83] Lenin, 25 Collected Works (Russian 2d ed.) 391.
[84] Lenin, 24 *op. cit.* 337 (italics supplied).

number of classes can be found in Soviet Russia as in any other country. Communists, technical specialists, the managing staff of governmental factories, higher and lower paid workers, collectivists and independent farmers, professionals—all these differ in their place in the national economy, in their relation to the means of production, in their role in the organization of labor, and, especially, in the size of their share in the national income, if not in their method of obtaining it. However, it is not the social standing but the frame of mind, the attitude of a given person toward the current soviet policy, that determines his class characteristics in the eyes of the soviet authorities. This is well illustrated by the rulings of the R.S.F.S.R. Supreme Court instructing the lower courts regarding the application of "class justice." During the forcible collectivization of farming, several laws were enacted authorizing the courts to impose upon kulaks (prosperous peasants) punishment for acts which were not deemed offenses if committed by members of other classes of the population. Also, higher penalties were established for kulaks who committed some ordinary crimes. The courts had difficulties in applying these laws. The R.S.F.S.R. Supreme Court explained the situation in the following terms (ruling of March 16, 1931):

> . . . There is no consistency in the application of the class point of view and a lack of clarity in the proper definition of the class standing of the defendant. . . . The same defendant is often recognized to be a middle-class peasant at the beginning of the judgment and yet is sentenced as a kulak. . . .
>
> However, in cases connected with economic campaigns and in cases involving the execution of the measures of the soviet government directed toward socialist reconstruction of agriculture in general, one of the fundamental tasks of the court is to ascertain the class standing of the defendant. . . . The

court is not bound in this respect by any formal criteria; it must ascertain in each case whether the defendant is still a middle-class peasant and *has according to his class interests no inimical attitude toward the measures of the soviet power,* or whether he is no longer a middle-class peasant, that is, has left them and joined the well-to-do kulak class. The courts must keep in mind that, according to the resolution of the Sixth Congress of Soviets "the poor peasant or the middle-class *independent peasant who helps the kulaki in the fight against collective farms and in subversion of the organization of such farms* cannot be called our ally and still less the supporter of the working class, he is in fact an ally of the kulaki." . . . In the meantime, the kulak, deprived of his possessions, deprived of his former economic basis, *has not lost his attitude toward the soviet power* and is no less socially dangerous than before.

For these reasons, the Supreme Court orders the courts to ascertain precisely in each case the social and economic status of the defendant, to check these data at the trial, and to indicate in the sentence by which economic criteria or activities the defendant has been classed with the kulaki, the highest class, and for what reason his hostility or resistance to the socialist measures of the soviet government in agriculture, et cetera, has been recognized [italics supplied].[85]

It is significant that at the time when the old classes still existed and "class justice" was in full swing, the Supreme Court of the R.S.F.S.R. complained that:

> Recent statistics for 1921 show that the major percentage of those convicted by the revolutionary tribunals belonged to the peasants and workers and that a very small percentage of convicts belonged to the bourgeoisie (in a broader sense). This ratio refers to all kinds of punishment including execution by shooting to death.[86]

[85] R.S.F.S.R. Supreme Court, Plenary Session, Protocol Ruling No. 4, R.S.F.S.R. Criminal Code as amended up to October 1, 1934 (in Russian 1934) 100–102; Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 2d ed.) 372–373.

[86] R.S.F.S.R. Supreme Tribunal, Military Bench Directive, March 2, 1922, Collection of Circular Letters of the Supreme Tribunal attached to the All-Russian Central Executive Committee for 1921, 1922, and of the R.S.F.S.R. Supreme Court for 1923, Stuchka, editor (in Russian 1924) 6.

Statistics published by the R.S.F.S.R. Supreme Court for 1923 indicate that among those shot by the sentences of the courts, workers and peasants constituted 70.8 per cent (23.6 per cent workers, 47.2 per cent peasants), intellectuals and white collar workers 20.7 per cent, and others, who include the bourgeois element, 8.5 per cent.[87] Thus, "class enemy" is merely a term to designate a person opposing the current policy of the soviet government. In suppressing opposition the soviet government came, in the postwar period, close to racial discrimination. Thus, the decree by which the Crimean and Checheno-Ingush autonomous republics were dissolved for disloyalty of the population during the German occupation stated that "in connection with this the Chechens and Crimean Tartars were resettled in (i.e., exiled to) other localities of the Soviet Union."[88] Both republics had a mixed population and the decree makes clear that the exile was applied to members of definite ethnological groups only. Although classes in the capitalistic sense of the term were abolished in the Soviet Union, the antagonism of social groups has not vanished. The political, racial, and other antagonisms, the clash of opinion and interests, are more acute in the Soviet Union than in any other place in the world, and within the Communist Party itself these conflicts are even sharper than among the populace of the soviet land. Thus, regardless of social changes in Soviet Russia, the differentiation of opinions in human society, the formation of separate groups united in pursuit of common objectives or against common opposition, will hardly cease.

[87] The R.S.F.S.R. Supreme Court in 1923. Report by President Stuchka (in Russian 1924) 26 and chart at end.
[88] Izvestiia, June 26 and 28, 1946.

As a justification of suppression of opposition, the "class point of view" was never abandoned although it is somewhat subdued in the theoretic definition of law (*supra*). This minimizes the significance of the fact that, in their quest for a Marxian theory of law, the soviet writers have come close to the precepts of analytical jurisprudence. Marxian background is still traceable in the present meaning of socialist legality.

III. Recent Development of Socialist Legality

1. Socialist Legality and Policy

The solution of the problem of socialist legality, i.e., of the actual operation of law in the soviet State, has continued to vary, depending not only on the results of theoretical speculation about the nature of law but also on the immediate objectives of government policy. Thus, during the intense struggle for consolidation of the social order. which was the goal of the Five-Year Plan designed on the basis of the domination of "public property," i.e., government property and property of the collective farms, Stalin commented on revolutionary legality as follows:

> They say that revolutionary legality of the present time does not differ from that of the first New Economic Policy period . . . this is entirely wrong. The revolutionary legality of the New Economic Policy period directed itself mainly against the extremities of war communism, against unlawful confiscations and requisitions. It guaranteed to the private boss, the capitalist, the safeguard of his property, provided that he strictly observed the soviet laws. The revolutionary legality of our time is quite different. It is pointed against thieves and sabotage, against hooligans and the grafter of public property. The main task of revolutionary legality consists now in the protection of public property and in nothing else.[89]

[89] Stalin, "The Results of the Five-Year Plan Speech at the Plenary

The maximum elasticity of law, its identification with policy and even political action, was advocated at that time, especially by Pashukanis and his followers. Pashukanis argued:

> The relationship of law and politics in our country is different from that in a capitalist society. In a capitalist society, the superstructure of law must have a maximum of immobility because it represents a firm framework for the movement of economic forces represented by capitalist entrepreneurs. Therefore, the creation of accomplished single legal systems is typical of capitalist jurists. It is different for us; we need the utmost elasticity in our legislation. We cannot tie ourselves to any system because we are every day breaking up the economic system. Policy is law; we have a system of proletarian politics, but we do not have any system of proletarian law.[90]

Various authors did not cease to repeat that soviet law is in the first place a form of policy and political action.[91] But the governmental policy implied in the political action became endangered by arbitrary administration. In their zeal for communism, certain administrators went further than was authorized by statute. Others treated indifferently or as a mere formality the instructions of the central government.[92] All the dan-

Session of the Central Committee and Central Control Commission of the Communist Party, January 7, 1933," Problems of Leninism (Russian 10th ed. 1935) 508, 509 (English ed. Moscow, 1940) 436, where revolutionary legality is inaccurately translated as "revolutionary law."

[90] Pashukanis, "The Situation on the Legal Front" (1930) Soviet State No. 11/12, 47–48.

[91] Gintsburg, 1 Course of Economic Law 113; Krylenko, "The Draft of a Criminal Code" (1935) Soviet State No. 1/2, 86; Pashukanis, For the Marxian-Leninist Theory of Law and State (in Russian 1931) 17, 24.

[92] For example, they continued to enforce agriculture communes in villages by compelling the peasants to pool in collective farms not only their fields, implements, and draft animals but also their poultry, personal property, and living quarters, while the leaders had decided on a looser type of collective farm. *Cf.* Stalin, article in Pravda, March 2, 1930; see also *id.*, Problems of Leninism (Russian 10th ed. 1935) 325–327, 581 *passim*. Others defied government orders for delivery of foodstuffs and stored grain or distributed produce more liberally among the members of the collective farms instead of delivering it to the government. Postyshev, "Basic Task of the Soviet Administration of Justice" (1932) Soviet State No. 2, 11.

ger implied in "revolutionary expediency," anticipated in 1926 (see *supra*), became a reality.

2. End of Legal Nihilism

Then "the nihilistic attitude" toward soviet law was condemned. Soviet jurists have come to believe, perhaps with reason, that neglect of statutes, their own meager knowledge of soviet law, and the inferior quality of their judicial work is the result of this theory.[93] Leading men in the legal profession no longer want the revolutionary expediency of a soviet law to be questioned by those who are called upon to enforce it. "There can be no discrepancy in soviet law between the law and expediency," wrote Vyshinsky in 1936, "because the soviet law is precisely the expression of what is expedient for the construction of socialism and the fight for socialism. Revolutionary or socialist expediency is the actual essence, the real content of soviet legality."[94]

In the textbook on soviet constitutional law published in 1938 under the editorship of Vyshinsky, the role of law in the soviet State is presented in the following terms:

> The dictatorship of the proletariat is a power unrestrained by any laws. But the dictatorship of the proletariat which creates its own laws, uses the laws, demands observance of laws, and punishes violation of laws. . . Marxism teaches that law must be used as a means of struggle for socialism, one of the means of the reconstruction of society on a new basis. . . Why do we need stability of laws? Because the stability of laws fortifies the stamina of the political regime and the span of governmental discipline; it multiplies and makes ten times

[93] Manikovsky, "Against Anti-Marxian Theory in Criminal Law" (in Russian 1937) Socialist Legality No. 5, 44.
For data on the judicial work of the soviet judges, see Chapter 7, I, 3.

[94] Vyshinsky, "The Stalin Constitution" (1936) Socialist Legality No. 8, 12.

stronger the forces of socialism, mobilizing and directing them against forces opposed to socialism. Law not only gives rights but also imposes duties.[95]

Thus, law is recognized as an efficient tool in the creation of the new social order, an instrument of rulership. It is not placed above the government, but on the other hand it is recognized that the government must rule by means of law.

3. Recent Attempts to Reconcile Marxism and Law

A further elaboration of the same view, although without much clarity, is given in a recent discussion of the problem of the interrelation of the State and the law by I. A. Trainin, president of the Section of Economics and Law of the U.S.S.R. Academy of Science.[96] The translation of the pertinent passages presents a peculiar difficulty because the Russian word *politika* covers both policy in the political sphere, i.e., political action, and politics as the sum total of political actions, policies, theories, etc. Thus, the present writer has rendered the same word *politika* as "political action" or "politics," depending upon his understanding of the Russian context. Trainin begins with the traditional Marxian thesis of the "economic basis" of all "ideological superstructures" (see *supra*) as follows:

> Marx-Lenin teaching recognizes that politics stems from the economy, develops in the struggle of conflicting forces which originate in the economy, and, being thus the result of such conflicts, is inseparable from the economy. In the economy is the key to the explanation of the facts of political life, to understanding of political currents struggling within the society, and to elucidation of the class struggle.

[95] Soviet Constitutional Law (in Russian 1938) 50, 52, 54.

[96] I. A. Trainin, "A Propos the Problem of the Interrelation Between the State and the Law" (1945) Izvestiia (Bulletin) of the U.S.S.R. Academy of Science No. 5, 1 *passim*.

On this statement, Trainin introduces a qualification:

> But it would be a mistake to consider the economy the only factor determining understanding of the historical process. One must take into account Marxian teaching on the mutual relations between the [economic] basis and the [political and legal] superstructure and on the bearing which the superstructure may exercise in turn upon its economic basis so as to cause its further development or change. Politics are not a mere impression moulded from the economy, as the vulgar materialists try to represent them, but the conclusions drawn from a generalization of the economy.[97]

He adds to this a rather obscure definition of politics as "the most concentrated expression of the economy, its generalization and accomplishment,"[98] given in the resolution of the Ninth Congress of the Communist Party (notably shared by Lenin), and concludes:

> Socialist political action is the concentrated expression of the socialist economy which determines the development of the soviet regime and the activities of the soviet State directed toward the strengthening of the union of workers and peasants under the guidance of the former with the Communist Party at their head, toward the fortifying of the friendship of nations, the development of socialist law and forms of socialist consciousness (science, art, etc.), for the purpose of planned progress on the road to communism in capitalist surroundings. . . .[99] Political action, the State, and law are three sides of the same process, but political action ("the concentrated expression of the economy") conditions the development of the other two . . . .[100] Law as a social phenomenon is connected with political action, but this is not a direct connection. It is effected through the State, which by its authority, force, and doctrine secures the realization of political action in the form of rules binding upon all, i.e., in the form of law. . . .[101]
>
> A statute is an act by means of which the State establishes a general rule of law or organizes agencies and institutions.

97 Trainin, *op. cit.* 7–8.
98 Lenin, 25 Collected Works (Russian 2d. ed) 558.
99 Trainin, *op. cit.* 8–9.
100 *Id.* 18.
101 *Id.* 10.

The socialist statute is one of the most authoritative instruments by the use of which the working class crystallizes its political action.[102]

From the viewpoint of Marxian philosophy one can see what is gained by this reasoning for the construction of a soviet theory of law, although a non-Marxist can hardly see the point of it. The soviet jurists have come to realize that law is for them an indispensable means of social control—"it fortifies the stamina of the political regime and the span of governmental discipline, et cetera" (Vyshinsky, see *supra*).[103] They still believe, however, that the soviet government must remain "a power unrestrained by law" (*ibid.*), and that freedom of political action by the government must be preserved. On the other hand, all "politics" or "policies" are, from the Marxian point of view, merely a superstructure on the economic basis.[104] Pashukanis, Gintsburg, and their followers anticipated a situation in which the superstructure should become superfluous. But it is indeed a necessity and in fact, under soviet conditions, dominates the presumed basis. Trainin upholds the proposition of the economic basis and superstructure but blends these concepts by means of the above characterization of politics as the "concentrated expression" or the "generalization" of the economy. Thus, political action is given the authority of a primary and independent factor such as economy appears to be in Marxian philosophy. Besides, Trainin's reasoning places political action, the State, and law in a hierarchy precisely as required by soviet practice. In contrast to Pashukanis' early theory, full authority is given to the law and consequently to the soviet statute, but law appears to be

[102] *Id.* 11.
[103] See *supra* at note 95.
[104] See *supra*, pp. 164–165.

"conditioned" by political action through the State, i.e., the government. Thus the government is visualized as unbound by law, being its creator and master. In the same treatise, Trainin discards all doctrines of the rule of law as futile.[105]

4. Present Trends

The full authority of the soviet statute established. the meaning of "socialist legality" in the new setting appears to be simpler than before. As invoked at present, it denotes a call for law enforcement. As under the New Economic Policy, it is again directed against arbitrary administration by the local authorities.[106] The sphere of private rights and private ownership in particular, in comparison with the New Economic Policy, is now more restricted, but a tendency to make these limited rights appear secure is also in evidence. In the early days, the soviet jurists candidly declared that, in the soviet State, "the rights of the individual are expressly subordinate to the rights of the collectivity."[107] Now Stalin maintains:

> Socialism does not deny but combines individual interests with the interests of the collectivity. Socialism cannot lose sight of individual interests. Only a socialist society can afford the most complete satisfaction of such personal interests. Moreover, a socialist society represents the only firm guarantee of the protection of such personal interests.[108]

105 Trainin, *op. cit.* 3 *et seq.*

106 Compare *supra* at note 89.

107 Evtikhiev, Fundamentals of the Soviet Administrative Law (in Russian 1925) 195; Kobalevsky, The Soviet Administrative Law (in Russian 1929) 34; Krylenko, The Judiciary of the R.S.F.S.R. (in Russian 1923) 176; *id.*, The Judiciary and the Law (in Russian 1927) 19: "In all instances, the interests of the whole, the duty to safeguard the social order, are to be the decisive criteria."

108 Stalin, "Interview with G. D. Wells, July 23, 1934" Problems of Leninism (Russian 10th ed. 1935) 602.

And the textbook on civil law insists that "the interests of the individual and of the whole of society coincide under socialism." [109] Thus, socialist legality is now invoked to call for the protection of limited rights secured under the new setting. But as before socialist legality does not imply candid recognition of private rights, nor does it restrict the omnipotence of the government. However, general evaluation of the change in soviet attitude toward law must be reserved until its implication for the private law in particular is analyzed.

[109] 1 Civil Law Textbook (1938) 24.

Chapter 6

Soviet Theory of Private Law: Sources of Law

I. Soviet Theory of Private Law

1. Dogmatic Trends Under New Economic Policy

The new attitude toward law in general which evolved after 1936 and is discussed in the preceding chapter, was of far-reaching consequence for the soviet private or civil law. It condemned the doctrine of the so-called "economic law" or "administrative economic law" which had been offered as a socialist successor to the capitalist private law or civil law and was the doctrine generally accepted after 1930. This doctrine of "economic law" was inspired by the discussion at the first convention of Marxist jurists in 1930, of the legal problems raised by the obvious conclusion of the New Economic Policy and the transition to the First Five-Year Plan, whose immediate goal was socialism.

The New Economic Policy after 1922 not only brought a revival of private enterprise and property rights under the Civil Code but also awakened legal thought which had been dormant under the period of Militant Communism (1918–1921). Textbooks, monographs, and law reviews appeared, one of these, *Law and Life,* being edited by lawyers loyal to the regime but non-Marxists. The provisions of the new Civil Code were repeatedly explained and interpreted by the meth-

ods of traditional jurisprudence,[1] and the teachings of the most advanced Western European legal writers, Duguit, Renner, and Hedemann.[2] The traditional jurisprudence was offered to the young soviet law as an "instrumentality without a face" (*bezlikiy instrumentariy*), a mere device for systematization and explanation.[3] It was more or less generally accepted that soviet

[1] Gintsburg, 1 Course 106, classed the majority of the following works (all in Russian) with those employing the dogmatic method:

Shreter, The System of Industrial Law (1924); *id.*, Domestic Trade (1926); *id.*, The Soviet Economic Law (1928); Gordon, The System of the Commercial Law of the U.S.S.R. (1st ed. 1924, 2d ed. 1927), translated into French as Le Système du droit commercial des Soviets (Paris 1933), completely out-of-date when published; Volfson, The Textbook of Civil Law (1st ed. 1924, 4th ed. 1930); Mitilino, The Commercial Law of the Soviet Republics (in Ukrainian 1928); Magaziner, The Soviet Economic Law (1928); Ashknazii, The Fundamentals of the Economic Law of the U.S.S.R. (1926); Volf, The Fundamentals of Economic Law (1928); Pobedinsky, Course of the U.S.S.R. Commercial Law (1926); "Commentaries to the Civil Code," published by the law review (noncommunist) Law and Life, Vinaver and Novitsky, editors, also by Soviet Law, Prushitsky and Raevich, editors. To an extent, here also belong the commentaries by Goikhbarg and Koblents (1st ed. 1924, 3d ed. 1926), and by Malistsky (1st ed. 1924, 3d ed. 1927). See also Varshavskii, Torts (1929); Kantorovich, The Basic Ideas of the Civil Law (1928); and monographs: by Agarkov, The Doctrine of Securities (1927); Volf, The Basis of the Economic Law (1928); Elyasson, The Law of Checks (1927); Grave, Commercial Institutions (1927); Martynov, Governmental Trusts (1924); Ashknazii and Martynov, The Civil Law and the Regulated Economy (1927); Landkof, Commercial Legal Transactions (1928); Symposia: Problems of Industrial Law (1925 and 1928); Syndicates and their Internal Relations; Soviet Industrial Law (1928); Problems of Commercial Law and Practice (1926).

[2] For Duguit's works, see Chapter 9. Hedemann, Fortschritte des Zivilrechts im XIX Jahrhundert, 3 vols (1910–1935); *id.*, Schuldrecht (1921); his pamphlet, Grundzüge des Wirtschaftsrechts (1922), and another were translated into Russian and printed in the Soviet Union in 1924. It is interesting to note that under the Nazi regime, Hedemann became the leading authority on civil law and drafted a new civil code: Das Volksgesetzbuch (1942), *cf.* Zur Erneuerung der Bürgerlichen Rechts (1938), Schriften der Akademie für Deutsches Recht, Gruppe Rechtsgrundlagen, No. 7; Karl Renner (President of Austria), Die Rechtsinstitute des Privatrechts und ihre Funktion (1929), originally published under the pseudonym Josef Karner in 1904 in the series Marx-Studien, also translated into Russian. Among the soviet writers, the Duguit doctrine of the social function of rights was especially propagated by Goikhbarg, Malitsky, and Volfson.

[3] Shreter, The Soviet Economic Law (in Russian 1928) 33.

private law represented a "combination of two elements fundamentally opposed but coexisting by necessity":[4] the elements of capitalist law in the private sector of commerce and small industry and of socialist law in the socialized sector, i.e., the economic sphere controlled by the government, comprising banking, large-scale industry, and foreign commerce. The private sector was the realm of private rights, free contract, economic autonomy. In the socialized sector planning and governmental regimentation ruled.[5]

Under the Five-Year Plan, from 1928 on, the socialized sector began to grow at the expense of the private. The sphere left to private rights shrank.[6] Since a new federal civil code was contemplated, this presented a series of legal problems.

2. Theory of "Economic" Law

In line with the general trend toward socialism, the slogan "fight for Marxian doctrine in law" was adopted by Pashukanis, Gintsburg, Dotsenko, and others. Stuchka proposed a compilation of two codes: one with elements of "capitalist" law regulating the remnants of private rights and free contract, doomed to wither away, and another for the socialized sector of government-controlled economy.[7]

The trend toward "economic" law, which was victorious at the conference, was definitely inspired by the

[4] Ilyinsky (Bruk), Introduction to the Study of the Soviet Law (in Russian 1926) 55; see also Kantorovich, The Legal Basis of the Economic System of the U.S.S.R. (in Russian 1925) 11; Malitsky 22, 23.

[5] Stuchka, 3 Course 4 *et seq.*

[6] See Chapter 9, II, and Chapter 16.

[7] Basic Principles of the Civil Legislation of the U.S.S.R., a Draft, edited and prefaced by P. I. Stuchka (in Russian 1931); Amfiteatrov, Basic Features of the Draft of a Statute on Contracts (draft appended) (in Russion 1934).

Marxist idea of economy as the primary law-creating factor, which has been considered above.[8]

The partisans of this trend of ideas identified private law primarily with property law and reduced all private rights to property rights. Since under socialism government property must prevail, it was considered that, instead of private or civil law, an "economic" or, more precisely, an "administrative economic law" must be contemplated.[9] This "economic" current more or less completely ignored the fact that private law deals with other rights than property rights, e.g., rights arising from domestic relations.[10] As was justly pointed out by later soviet critics, human beings under the "economic law" as thus construed are treated as mere "consumers of goods" in a socialist system of production.[11] But at the time when the doctrine enjoyed official recognition, a two volume course in "economic law," instead of "civil law" or "private law," appeared. Economic law was therein defined in one passage as "a special form of policy of the proletarian State in the province of organization of socialist production and soviet commerce," and elsewhere as "the application of revolutionary legality to the organization of socialist production and soviet commerce (economic connections)." [12]

[8] See *supra*, Chapter 5 at notes 33–35.

[9] Gintsburg, 1 Course 34; *id.*, Collection of Materials on Administrative Economic Law (in Russian 1931) 10; The Soviet Economic Legislation, 2 vols. (in Russian 1934); Stuchka, 1 Course 9.

[10] Zavadsky, a Russian refugee jurist, pointed out the fallacy of such a narrow concept of civil law in 2 The Law of Soviet Russia (in Russian, Prague 1925) 6. An identical view was at length stated in 1 Civil Law Textbook (1938) 9; but 1 Civil Law (1944) again conceives the civil law as law pertaining to property and excludes domestic relations as such from civil law. 1 Civil Law (1944) 10 *et seq*. See also *infra*, notes 24–26.

[11] 1 Civil Law Textbook (1938) 42.

[12] Gintsburg, 1 Course 6, 18.

3. Reversion to Civil Law

This whole trend was condemned in 1937, together with the term "economic law." Since then the soviet jurists have come to recognize the necessity of civil law and private rights in their socialist State and in their legal philosophy. Moreover, certain common institutions, such as inheritance and the family, have appeared in a new light and obtained, through new legislation, features more akin to the traditional law of inheritance and domestic relations.[13] But neither the shift in theoretic attitude to civil law nor the changes in civil legislation have equally affected all fields of civil law. Inner conflicts and contradictions in the soviet legal system, so bluntly brought out in the teachings of Pashukanis and the "economic administrative law" school, have not ceased to exist. Dualism in the soviet law of contracts and property law is more distinct than ever,[14] although this is denied by the soviet legal theorists of the present time, who insist that there is only one harmonious and single socialist civil law in the Soviet Union.[15] Their task is to embrace in one theory a situation implying mutually opposed elements, comprising for instance, one law of contracts and property for citizens and another for government trading agencies. The successive attempts made in this direction have not brought about realization of this aim. Various authors have voiced different opinions,[16] and two officially recog-

[13] See Chapter 4, I, and Chapter 17, Inheritance Law.

[14] See Chapters 12, 13 and 16.

[15] See passage quoted *infra*, at note 26.

[16] Godes, "Subject Matter and System of Soviet Civil Law" (1939) Soviet Justice No. 1; Genkin, "The Subject Matter of the Soviet Civil Law" (1939) Soviet State; Bratus, "Concerning the Subject Matter of the Soviet Civil Law" (1940) *id.*, No. 1; Arzhanov, "Subject Matter and Method of Legal Regulation in Connection with the Problem of System of the Soviet Law"

nized textbooks on civil law that appeared in 1938 and 1944 offer each a different construction. The difficulty is rooted in the fact that the soviet theories of the past were disavowed, because of the practical danger implied in the conclusions at which their authors arrived. But the premises from which the conclusions were drawn, i.e., the Marxian philosophy seeking to explain law in terms of economics and the omnipotence of the State in regulating social life and rights, retain their full authority. The downfall of Pashukanis' theory and economic law was caused by their potential danger for the authority of soviet legislation as a means of social control rather than their theoretic fallacy or error as an observation of the trends in soviet legislation. The soviet leaders were not prepared to let the soviet jurists declare protection of private rights to be a capitalist element in the law of a socialist state. Nor could a plain identification of law with policy, advocated by the partisans of "economic law" (see *supra*) promote observance of the soviet laws by judges and administrative officers. It is characteristic that, in criticizing the theory of economic law, the recent soviet writers invariably quote the following statement made by Vyshinsky in 1937:

> Substitution of the so-called "economic law" for civil law is a valuable service to the enemies of Communism, to the slanderers who tell tales that Communism presumably suppresses personality, and recognizes no other categories than society, economy, production.[17]

(1940) *id.*, No. 8/9; Mikolenko and Bratus, "Subject Matter and System of the Soviet Socialist Law" (1938) Soviet Justice No. 16. For a survey of these opinions in English, see Schlesinger, Soviet Legal Theory (London and New York 1945) 251–256.

[17] Vyshinsky, "About the Situation on the Front of Legal Theory" (1937) Socialist Legality No. 5, 37.

Therefore the soviet jurists have to find an interpretation of soviet law showing the realization of Stalin's contention that: "Socialism does not deny but combines individual interests with the interests of the collectivity. Only a socialist society can afford the most complete satisfaction of such personal interests." [18] But this must be done without affecting the authority of the provisions restricting private rights.

4. Recent Trends

With the recognition of full authority of laws and restoration of the term civil law, legal technique and logics had to be admitted in dealing with legal problems. But the supremacy of plan over contract, of government ownership over private, and similar premises of disavowed theorists still remain the basis of legal theory.

The authors of the textbook of 1938 scorned the economic law doctrine as neglecting private rights and giving a narrow conception of civil law confined to property relations. They definitely included the domestic relations in the sphere of civil law but do not present any clear definition of what civil law in the soviet State is. Instead, the subject matter of civil law is outlined as a branch of legal studies. According to the textbook, the study of civil law in the soviet State should embrace "the rules regulating the civil legal relations of the socialist society." [19] The characteristic feature of these relations in contrast to legal relations pertaining to other fields of law is that "a certain freedom, independence, and initiative is recognized to some de-

[18] Stalin, "Interview with G. D. Wells, July 23, 1934," Problems of Leninism (Russian 10th ed. 1935) 602.

[19] 1 Civil Law Textbook (1938) 12.

gree to all participants in these relations." [20] But the authors are also fully aware that soviet law in many instances denies such freedom to the participants in such legal relations as could be otherwise considered civil, e.g., in relations of contract and property. Thus, the authors state that there is a series of social relations in the Soviet Union that "have an in-between character. The State may regulate these relations either in a civil law or in an administrative law manner." [21] It is characteristic that the whole discussion of civil law is centered not on the protection of rights but on a looser concept of regulation of legal relations. But no less characteristic is it that, in discussing individual points of the soviet civil law, the textbook displays in many instances a pragmatic and, one may say, dogmatic attitude along traditional lines, e.g., in the treatment of torts as discussed in connection with the pertinent problems.[22] Thus, the technique of the traditional civil law is used, but its spirit and ideological background continues to be rejected by the soviet jurists.

In any event the most recent textbook of 1944 again offers a new theory. In contrast to its predecessor, the textbook directs the main attack not against the theory of "economic law" but against the theory asserting the dual nature of soviet law—one law for the socialized sector and another for the private. Likewise, plan and free contract must not be treated as opposing elements but in a harmonious blend in soviet law.[23] In a way, the textbook denies the existence of any civil law as private law in the Soviet Union. Thus it is stated:

[20] *Id.* 10.
[21] *Ibid.*
[22] See Chapters 14 and 15 on Torts.
[23] 1 Civil Law (1944) 9 *et seq.*

> Under socialism, civil society is no longer set apart from the political organization of the society—the State; there is a unity of political and economic direction; public and private interests are combined: all of which excludes the possibility of subdividing socialist law into public and private—civil law. The united, single soviet socialist law is subdivided into several branches depending upon the circle of social relations that it regulates.[24]

In full agreement with the theory of economic law, the textbook considers property relations to be the field regulated by soviet "civil" law. But it emphasizes in contrast to that theory, that the property relations of soviet citizens cannot be treated separately from the property relations of governmental organizations and the State as a whole. Again, it admits the existence of certain nonproperty values, whose protection belongs also to the sphere of civil law, e.g., the right to a personal name. The textbook is not quite satisfied with the term "civil law," and objects to the term private law. It stresses that in the capitalist society civil law is the law protecting private interests, and that it allows an amount of freedom and autonomy in contrast to administrative, criminal, and other branches of public law in which mandatory rules of law are predominant.[25] No such criteria may be used for the definition of soviet "civil law," which term, according to the textbook, acquires in the soviet setting a "conventional meaning," which is as follows:

> The soviet civil law is a branch of a single system of soviet socialist law that consists of rules determining the legal status of organizations and citizens in their capacity as participants in property relations of the socialist society and regulating these relations as well as rights of citizens in nonproperty values inseparable from the person.[26]

[24] *Id.* 4.

[25] *Ibid.*, also *et seq.*

[26] *Id.* 10, 11.

The rights in "personal nonproperty values" is explained to mean the rights to a personal name, to protection of health and honor, and to copyright. Thus, as before, it is attempted to construe the notion of "civil law," evading the fundamental problem of private rights. The "conventional meaning" of civil law thus offered makes it difficult to separate civil law from allied fields. Property relations come under a variety of rules of law. Again, under the government monopoly of commerce and industry, it is difficult to draw a line between the sphere of administrative law governing the governmental trading agencies and the civil law. The textbook proposes without much clarity to assign to the sphere of administrative law:

> Relations arising out of acts of an organizational and constitutive nature and determining the basis upon which civil relations are formed. Secondly, to the administrative law should be assigned relations which arise between the organizations, as well as between the organizations and the citizens, in connection with the issuance of acts of planning which determine property relations.[27]

The textbook also separates from civil law, land law, labor law, the law of collective farms and, in a somewhat hesitating manner, that of domestic relations.[28] In fact, however, in presenting the material, the textbook in one way or another enters all these fields. Similarly to the textbook of 1938, the textbook of 1944 also offers in many instances a sound legal treatment of individual problems and makes liberal use of fragmentary traditional legal concepts. Thus, on the one hand, the soviet theory of private law seems to revert to the theory of economic law. On the other hand, a dogmatic

[27] *Id.* 11.
[28] *Id.* 12, 13.

analysis in the presentation of individual legal institutions is in evidence in the 1944 textbook and in recent soviet writings on private law, this in larger measure than was the case some ten years ago.[29] But the version, dogmatic or pragmatic, is not crystallized in a philosophy of private law. The nature of present soviet legislation, with its many restrictions on private rights, does not stimulate broad legal constructions. The use of dogmatic analysis, by methods similar to those used in nonsoviet jurisprudence, is confined to very narrow and technical problems, and it does not carry with it the spirit of private law. It does not make soviet law more private or civil in character. A passage from the recent soviet treatise on labor law of 1946 illustrates how a legal analysis of narrow clauses may easily lead to hair splitting. The author analyzes the legal consequences of sleeping on the job by an employee. This particular question would come, in a nonsoviet jurisdiction, within the field of private law, viz., master and servant or contract of employment. The Acts of December 28, 1938, and of January 9, 1939, declared tardiness for over twenty minutes, or repeated tardiness, a mandatory reason for dismissal. Loitering on the job was also declared subject to disciplinary penalties. But the Edict of June 26, 1940 and the Act of January 18, 1941, declared absenteeism an offense subject to punishment in court. An employee, says the statute, is considered absent if he is late for work without a good reason; late from lunch for more than twenty minutes; leaves more than twenty minutes ahead of time; or is, in a similar way, tardy for less than twenty minutes, but thrice within one month, or four times within two

[29] See 1 Problems of the Soviet Civil Law (in Russian 1945); also Transactions (Uchenye Zapiski) of various law institutes, printed after 1939.

consecutive months; or if he appears at work in a state of intoxication. This was the legal problem discussed by soviet writers and the Supreme Court: [30]

The question whether loitering on the job or sleeping during working hours should be considered absenteeism came up in judicial practice several times. Legal writers answered this question in various ways. Some thought that "there is no reason to exclude . . . loitering on the job from the concept of absenteeism," [31] while others were of the opposite opinion.[32]

From the comparison of Sections 21 and 26 of the Standard Rules of Internal Order, it becomes evident that loitering on the job, regardless of how long it lasts and how often it occurs, entails a disciplinary penalty and not punishment in court. Sleeping during working hours is a form of loitering on the job and therefore should not be considered absenteeism. This conclusion is supported by the following ruling of the Trial Criminal Division of the U.S.S.R. Supreme Court: "Insofar as sleeping on the job is a violation of labor discipline, not connected with the absence of the worker from his post but, on the contrary, necessarily presumes his presence there, such an offense may not be qualified as absenteeism. Being a kind of loitering, sleeping during working hours, if it did not and could not cause serious harm, must be visited by disciplinary penalty." [33]

Such problems or their unimaginative legalistic treatment cannot stimulate development of jurisprudential principles.

The events of the postwar period brought about the possibility of a new revision of soviet legal theory. The Resolution of the Central Executive Committee of the

[30] Aleksandrov, joint author, Soviet Labor Law (in Russian 1946) 279, 280. See also Chapter 22, pp. 819 *et seq.*, 829 *et seq.*

[31] Here the author refers to Dubovsky, "Concept of Absenteeism" (1941) Soviet Justice No. 1.

[32] Here the author refers to Moskalenko, "The New Rules of Internal Order" *id.*, No. 11.

[33] U.S.S.R. Supreme Court, Criminal Trial Division Decision, 1943 (1943) Judicial Practice of the U.S.S.R. Supreme Court No. 4, 14.

For translation of the Standard Rules of Internal Order cited, see Vol. II, No. 40.

Communist Party of August 14, 1946, criticizes the ideological character of present soviet literature, art, and social sciences, including jurisprudence.[34] It calls for the clearing from these fields of foreign influences and for better observance of communist ideological purity. However, criticism of soviet jurisprudence is this time couched in very general terms. No particular writer and no specific theory is condemned. The principal jurisprudential center, the Law Institute of the Academy of Science, is blamed primarily for the failure to produce certain work and not for disseminating the wrong kind of theory.[35] The Institute, it is said, "did not offer any serious scholarly work concerning the theory of soviet State and Law" and international law; it did not criticize the bourgeois theories of State and did not elaborate the theory of "the new type of democracy" which developed after the war in Eastern Europe under the aegis of the Soviet Union. It seems that the leadership of the Institute was somewhat lost in determining what is now wrong with soviet jurisprudence and in its turn confined itself to some general statements which imply, however, the possibility of a new dominance of social and economic policies over legal reasoning in soviet law. Thus, the editorial in the law review of the Institute discussing the situation, emphasizes that jurisprudence is the most political branch of science. Therefore:

> The main requirement mandatory upon the scholarly work of the jurists is to be on the level of the demands of the Marx-Leninist doctrine of State and Law and to manifest intolerance of any distortion of this doctrine, of alien doctrines and influences. . . . Any manifestation of juridical formalism

[34] See Chapter 4 in fine.

[35] (1946) Bolshevik No. 15, 6–7.

which pulls back to bourgeois jurisprudence is especially inadmissible.[36]

The whole program lacks clarity. On the one hand, the absence of an up-to-date work stating the doctrine of the soviet State and law is recognized, and on the other hand, the soviet jurists are called on to conform with this doctrine which, as is shown *supra,* is under constant revision. The attack on juridical formalism may not bring about any restriction on dogmatic analysis of soviet institutions. Because no definite ideological faults in jurisprudential writing were pointed out, it may well happen that soviet jurisprudence will continue in the same direction, borrowing legal technique from the nonsoviet jurisprudence but rejecting its spirit and broad principles.

5. Private Versus Public Law in Soviet and Nonsoviet Law

The soviet jurists are indeed not alone in facing difficulty in the delineation of public and private law in their State. Though old terms, inherited from Rome, public and private law are by no means well defined and uniformly understood in the European and modern Anglo-American jurisprudence.[37] The soviet theories described above are not as original as they may appear at first sight. They are rather, reflections of certain opinions voiced in the nonsoviet jurisprudence beginning with the late nineteenth century when the traditional concepts of public and private law formulated by the Roman jurists began to be challenged. Public law was

[36] "Facing Important and Responsible Tasks" (1946) Soviet State No. 10, 2, 4.

[37] Roscoe Pound, "Public Law and Private Law" (1939) Cornell L. Quarterly 469.

for the Roman jurists, using the paraphrase of Roscoe Pound,[38] that part of law which had to do with the constitution of the Roman State and private law with the interests of individuals, *publicum jus est quod ad statum rei romanae spectat, privatum quod ad singulorum utilitatem.*[39] The modern Romanist view has been formulated by Roscoe Pound thus:

> "Private law had to do with adjusting the relations and securing the interests of individuals and determining the controversies between man and man, while public law had to do with the frame of government, the functions of public officials, and adjustment of relations between the individuals and the State."[40]

But modern critics of the Roman concept no longer think that the protection of private interests is the specific sphere of civil or private law, while public law deals with public interests. Is the State, they have questioned, really disinterested in the construction to be given to family, ownership, and inheritance, all of which are undoubtedly institutions of private or civil law, and did it ever refrain from their regulation? On the other hand, it is argued, contracts for war supplies are obviously made by a government agency in pursuit of public administration, but are nevertheless within the purview of civil law. Thus, some writers have turned from the character of the parties in interest to the subject matter regulated or to the method of initiating judicial action to find a criterion for delimiting the proper spheres of private and public law.[41] Long before the soviet advocates of "economic law," some conservative

38 *Ibid.*

39 Institutes I, 1, 4; also D I, 1, 2.

40 Roscoe Pound, *op. cit.*, particularly refers to Dernburg, 1 Pandekten (8th ed. 1911) Section 16, p. 34.

41 I. Pokrovsky, Basic Problems of Civil Law (in Russian 1917) 7 *et seq.*

writers considered relations involving property to be the theoretically proper sphere of civil or private law.[42] Others laid stress on the fact that, in civil law cases, judicial action, as a rule, is commenced on private initiative, while in public law, criminal law in particular, suit is brought at the instance of public authorities.[43] Against these opinions, it has been correctly pointed out that the civil relations of guardian and ward or parent and child, cannot be reduced to property relations. Likewise, some civil suits may be initiated by authorities, and contrariwise there are criminal actions on private complaints. This has induced other writers to look for the criterion of delimitation in the method of legal regulation, i.e., of providing rules to govern disputes arising in a particular field of law.[44]

The last named line of thought became well developed in the Russian jurisprudence and was formulated just before the Revolution with great vigor and force by Professor Joseph Pokrovsky.[45] His teachings in fact form the background of the discussion of the problem of private law by the soviet jurists. Without directly referring to these teachings, the soviet jurists either follow Pokrovsky's ideas or, when departing from them, seek to justify this departure. For this reason an exposé

[42] Sohm, Institutionen des Römischen Rechts (3d ed. 1888), Section 19, p. 93; *id.* (16th ed. 1919) 25; Kavelin, "What Is Civil Law" 4 Collected Works (in Russian 1900); Meier, Course in Civil Law (in Russian 10th ed. 1910).

[43] Thon, Rechtsnorm und subjectives Recht (1898) 108–146; Rudolf von Jhering, Geist des Römischen Rechts, Part III (4th ed. 1888) Section 61; Duvernua (Duvernois) 1 Lectures in Civil Law (in Russian 1898) 28 *et seq.*; Gambarov, 1 Course in Civil Law (in Russian) 50.

[44] Radbruch, Grundzüge der Rechtsphilosophie, (1914); *id.*, Rechtsphilosophie (3d ed. 1932) 122 *et seq.*; Rudolf von Stammler, Wirtschaft und Recht (5th ed. 1924); *id.*, Theorie der Rechtswissenschaft (1917) 402 *et seq.*

[45] Pokrovsky, *op. cit.*; prior to this work, Petrazicki, 2 Theory of Law (in Russian 1910) 647 *et seq.*

of his doctrine seems to be indispensable in a study of the soviet theory of private law. Pokrovsky states:

> The general purpose of law is to regulate mutual relations of men. If we look more closely at the methods and fashions by which such regulation is accomplished, the following major difference is observed. In some fields, the relations are regulated exclusively by commands emanating from one state center, the government authority. It determines by its rules the juridical position of each individual, his rights and duties toward the entire organism of the State and toward other individuals. Provisions determining the position of each individual in a given sphere of relations may emanate only from the government authority and no private will, no private agreement, may change this position (the Roman jurists used to say: *publicum jus pactis privatorum mutari non potest*). The government authority regulates all these relations on its own initiative, exclusively by its own will and therefore cannot admit in this sphere any other initiative or will. Hence, the rules emanating from the government authority in such sphere are of a mandatory, compulsory nature (*jus cogens*); the rights granted are also in the nature of duties: they must be exercised because nonexercise of rights appears as a failure to discharge duties connected therewith (laxity in office). . . . This method of legal centralization is the essence of public law. . . .
>
> An altogether different method of legal regulation is used in the fields assigned to the sphere of private or civil law. Here the government power abstains on principle from direct and authoritarian regulation of relations; here the government authority does not visualize itself to have the position of the only determining center but, on the contrary, leaves the regulation to a multitude of other small centers visualized as independent social units, as holders of rights. In the majority of cases, the individual human being appears as such a center, but there are also artificial entities, corporations and endowments, in other words, legal entities. All these small centers are presumed to exercise their own will and initiative; that is to say, the regulation of their mutual relations is left to them. The State does not seek to determine these relations itself but takes the position of an organ protecting whatever is established by individuals. The State does not direct a private person to

become the owner or heir or to marry; all this depends upon the will either of one private person himself or of several of them (parties to a contract); but the State will protect the relation established by a private will. If the State gives a determination, as a rule, this is done only in case private persons fail, for some reason, to make their own dispositions, that is to say, it is done to fill a gap. Thus, for example, the State establishes the rules of succession to be applied in absence of a testament. Therefore, the rules of private law have for the most part a subsidiary or optional and not mandatory character and may be set aside or replaced by private dispositions (*jus dispositivum*). Hence, a private right is a right pure and simple and not a duty: its holder is at liberty to use or not to use it; nonexercise of a right is not a violation of law.

Thus, while public law is a system of centralized legal regulation of relations, private law is a system of decentralized legal regulation; by its very nature, it requires for its existence the presence of a multitude of autonomous centers. While public law is a system of subordination, private law is a system of co-ordination; while the former is the sphere of power and subjection, the latter is the sphere of freedom and private initiative.[46]

Civil law as a decentralized system of legal regulation is based by its very structure on the presumed existence of a multitude of small centers, autonomous organizers of life in the spheres included in civil law. These centers are the holders of rights. For the realization of freedom and initiative, which constitute the main purpose of civil law, these holders of rights are granted so-called private rights (right of ownership, right to demand performance of an obligation), the very essence of which consists in the possibility, secured by law, to act on the basis of free will.

Thus, the concept of a holder of rights and private rights belonging to him is the logical prerequisite of any civil law; without these concepts civil law is unthinkable. . . . The number and the scope of rights to be granted to the individuals may be disputed, but the idea of a person as a holder of rights and the idea of private rights itself should not be questioned. . . .[47]

[46] Pokrovsky, *op. cit.* 8–10.
[47] *Id.* 84.

> Aboriginally and by its very structure the civil law has been the law of an individual, the sphere of his freedom and self determination.[48]

Pokrovsky stresses the fact that the dividing line between the sphere of private law and that of public law, as he conceives them, did not remain unchanged in various epochs. In the early stages of civilization, even in ancient Rome, crime and punishment were a matter of civil action and consequently criminal law was private law.[49] Vice versa, the religious life of the community tended in the nineteenth century to become a sphere regulated in a private law style. Nor could the dividing line be drawn with precision at any moment of development in a given legal system. It would be more accurate to say that private law is characterized by the predominance of decentralized regulation, while centralized regulation dominates in public law. It may be observed that the salient point of Pokrovsky's analysis lies in his conclusion that recognition of private rights is the basis of civil or private law. Here his theory of private law comes close to the Anglo-American concept of law as explained by Roscoe Pound in his contribution to the problem of private versus public law.[50]

Coming back to the soviet discussion of the problem of civil law in the soviet State, one is bound to conclude that the soviet theories appear to be inspired by one opinion or another, expressed before in the nonsoviet jurisprudence. The recent soviet writings bear unquestionable trace of the influence of Pokrovsky's analysis. His theory of decentralized regulation, as the specific

[48] *Id.* 309.

[49] *Id.* 11.

[50] Roscoe Pound, *op. cit.*, note 37, 475: "Rights, that is legally recognized and delimited interests, secured by the law, are a means of co-ordination. . . . Rights stand in the way of subordination."

method of civil law, was in fact accepted by the textbook of 1938.[51] When the 1944 textbook denies the necessity of a distinction between private and public law in the soviet law, such distinction is conceived there in the light of Pokrovsky's theory. Having rejected his criterion, the textbook has chosen again the doctrine of property relations as the sphere of soviet civil law, previously advanced in nonsoviet jurisprudence. Again the objections to the terms, civil law and private law, are based on Pokrovsky's explanation of the terms.[52] One point in his doctrine is, however, avoided in the recent soviet constructions. It is the importance attached by him to the concept of private rights as the basis of civil law. This very point furnishes also an explanation of the constant fluctuation in the soviet theory of soviet law. It is rooted in the precarious status of private rights in the Soviet Union.[53] So long as the soviet statesmen and jurists refuse to recognize private rights as natural innate rights of human beings and see in them a grant by the government and the soviet law provides rather for their restriction than their free exercise, any attempt at a constructive soviet theory of private law is deprived of sound foundation.

II. Sources of Soviet Private Law

1. Soviet Theory of Sources of Law

The present day soviet doctrine of the sources of private law and their interpretation is more akin to traditional views than it was during the period of experimentation when new theories were being formulated.

[51] *Cf. supra* at note 20.
[52] *Cf. supra* at notes 25 and 41, 42.
[53] See Chapter 9.

In discussing at that time the sources of soviet law, the soviet jurists could not pass over the following statement by Stalin:

> It must not be forgotten that we are a ruling party, not an opposition party . . . In the case of a ruling party . . . such as our Bolshevik Party is, the slogans of such a party are not mere (agitational) slogans, but much more, for they have the force of *practical decision*, the *force of law*, and must be carried out immediately.[54]

Thus, the textbook on "economic law" of 1935 made a bold attempt to indicate the sources of the soviet law with a striking departure from the tradition of civil law countries and common law as well. Extralegal sources, such as decisions of the Communist Party and Marx-Lenin doctrine, attain almost a priority over legal sources. A nonsoviet jurist will undoubtedly find rather confusing the suggestions given:

> The basic and, in the last analysis, the only source of the soviet law is the dictatorship of the proletariat. . . . The sources of the soviet law are: decisions of the organs of the Party, joint decisions of the Party and the government, statutes, decisions of the courts and the arbitration commissions, decisions of the central organizations of the trade-unions and the co-operative organizations. The Communist Party is the main instrument of the dictatorship of the proletariat. . . . Therefore, the decisions and the directives of the Party are the most important (although not the most voluminous) sort of sources of the soviet law, and of the civil law in particular. It is true that the Party decisions are directly binding upon the members of the Party only. However, insofar as the Party directs all the toilers in the country and in the cities in their struggle for socialism, and insofar as the Party leadership is secured by all the soviet, professional, co-operative, and other public organizations of the soviet State without any exception, Party decisions acquire a common obligatory character . . . Resolutions of the organs of soviet power or laws are the most

[54] Stalin, Speech of April, 1929, Problems of Leninism (English ed. Moscow, 1940) 273, italics in the original.

voluminous category of the sources of soviet law. . . . Marx-Lenin doctrine is not an official source of law, and yet it must be used in the most extensive way in the process of legislation (in lawmaking), as well as in application of the law (by the courts in particular). . . . The role of custom is reduced to a minimum within the proletarian State under the revolutionary reconstruction of all social relations.[55]

The textbook of 1936 draws a distinction between the sources of law in a broader sense and in a narrow (technical) sense, and shows the transition to acceptance of the traditional concepts:

Inasmuch as we treat soviet private law as a special form of policy of the proletarian dictatorship, it is apparent that the source of that law in a broader sense is the dictatorship of the proletariat, that is, the soviet State. In this connection, it is necessary to emphasize the decisive importance of the directives of the Party for soviet private law . . . The directives of the Party on economic questions determine the contents of the soviet economic and civil legislation. "The soviet law is not a dead dogma, it is a living and operative expression of the will of the Party and the government imbued with the spirit of the fight for socialism." (*Pravda*, August 7, 1934.) In recent years, joint directives of the Central Committee of the Party and of the Council of Peoples' Commissars have been issued . . . These resolutions appear as both Party directives and soviet law.

The revolutionary theory of Marx-Lenin-Stalin is of the utmost importance for soviet private law. . . . However, from these sources of law in a broad sense, the sources of law in a narrower (technical) sense must be distinguished, i.e., propositions (rules) expressing the content of law. Such sources of soviet private law are: (a) statutes; (b) decrees of local authorities (executive committees and soviets); (c) orders and regulations issued by individual government departments, etc.; (d) decisions of the courts and arbitrators deciding disputes between governmental enterprises.[56]

The textbook of 1938 starts with the same extralegal

[55] Gintsburg, 1 Course 121, 122, 128.

[56] Rubinstein 30.

propositions as its predecessor but omits the discussion of the role of Party decisions and, for all practical purposes, looks for the sources of law where the nonsoviet jurist would look:

> The only source of soviet socialist law is the dictatorship of the proletariat. There is no succession whatsoever between the soviet revolutionary law and the law of the overthrown capitalists' and landowners' regime. Likewise, one cannot speak of any borrowing in the field of law by the socialist State from the capitalist states. In contrast to capitalist relations, which were formed in the womb of feudalism, socialist relations came into being only under the dictatorship of the proletariat. It is in this sense that we say that the dictatorship of the proletariat is the only source of socialist civil law that shapes and consolidates socialist production. However, the term "sources of law" is used to denote other concepts also . . . Most frequently by sources of law we mean those forms in which law is expressed, such as statutes, decrees, customs, court decisions, etc. . . . In connection with the purposes of the textbook, the subject of this chapter is the discussion of the forms in which the rules of civil law have found expression.[57]

Undoubtedly, a nonsoviet jurist, who might be somewhat lost at the beginning of the passage, would feel quite at home in the traditional categories and concepts to be found at the end.

The 1944 textbook follows in the main, the same line of thought:

> The will of the ruling class is the source of law in the substantive sense . . . The dictatorship of the working class is the source of the soviet law in general and the soviet private law in particular. There are no antagonistic classes in the U.S.S.R. but only friendly classes of workers and peasants; therefore, the will of the working class serves as the will of the entire soviet nation. By sources of law in a formal sense, the forms are meant in which the rules of law in force are expressed . . . In speaking below of the sources of soviet law, we have in mind only the sources of law in the formal sense,

[57] 1 Civil Law Textbook (1938) 44; Golunsky, Theory 173 *et seq.*

i.e., we shall describe the forms in which the soviet private law finds its expression.[58]

After a survey of sources of capitalist law, the textbook groups the soviet sources under the topics: legislative enactments, customs, judicial practice, and rules of everyday life of a socialist community.[59]

Thus, with the exception of the last named group, the sources of soviet law in a "formal" or "technical" sense may be reduced to the traditional categories—statutes, custom, and court decisions—which are discussed *infra,* under these topics.

The "rules of everyday life of a socialist community" were first mentioned in Section 130 of the 1936 Constitution; they appear in the Judiciary Act of 1938 and in the definition of law by Vyshinsky quoted in Chapter 5.[60] From the discussion to be found in the soviet writings, it transpires that this term is a kind of soviet equivalent to good morals and usage.

It is interesting to note the attitude of the soviet legal writers to so-called autonomy in private lawmaking. Several European scholars have pointed out that in modern life rules and regulations issued within a certain sphere by corporate bodies or certain agreements between organized groups, notably collective bargains, are recognized by the State as having the force of law.[61] In such instances, one may speak of a delegation of specific legislative powers. The Italian Civil Code of 1942 mentions such rules under the name of "corporate

[58] 1 Civil Law (1944) 27.

[59] *Id.* 29, 33, 34, 35.

[60] See Chapter 5, note 66. For discussion of this category, see also Chapter 9, I, 8 in fine.

[61] Regelsberger, 1 Pandekten (1893) 105; Cosack, 1 Lehrbuch des Deutschen Bürgerlichen Rechts (5th ed. 1910) 154; *id.* (7th ed. 1922) 18, 147; Oertmann, Rechtsordnung und Verkehrssitte (1914) 5 *et seq.*

rules" (*norme corporative*) among the sources of law. Here belong, according to the Code, rules and regulations issued by corporate bodies within their jurisdiction, collective agreements and determinations by the labor court when and where they are not in conflict with statute (*leggi*).[62] At present, the soviet jurists deny any such private lawmaking in the soviet State.[63] However, it may be mentioned in this connection that the function of a department of labor is exercised by the Central Board of Trade-Unions in the Soviet Union. Orders issued by this Board in this capacity certainly constitute a part of the soviet statutes on the same level as other departmental orders (see *infra*).

2. Interpretation of Law

The recognition of the authority of law in the soviet legal theory that occurred around 1936 was followed by a change in the attitude of the soviet jurists to the interpretation of law. Up to that time, and in the thirties in particular, the soviet jurists did not cease to look for a particularly soviet and Marxian approach to statutory provisions and sought a new method of interpretation and application of soviet law. The passages from the textbooks of 1935 and 1936 quoted *supra*[64] bear traces of the quest for socialist legality discussed at length in Chapter 5. The student of soviet civil law, the judge and the lawmaker, are there directly advised to resort to Marxism-Leninism-Stalinism and the directives of the Communist Party when applying and inter-

62 Italian Civil Code of 1942, Introductory Provisions, Sections 1–5. Reference to *"norme corporative"* was stricken from the Code by the Decrees of January 20, 1944, No. 25 and September 14, 1944, No. 287.

63 1 Civil Law (1944) 34.

64 See *supra*, notes 55 and 56.

preting soviet law. The textbook of 1938 still insisted that "for the application of soviet laws knowledge of Marxism-Leninism, which is their theoretic foundation, and ability to employ the materialistic dialectics are necessary." [65]

The textbooks of 1944 and 1945 contain no such references in their discussions of the interpretation of soviet laws. The textbooks explain instead the traditional methods of legal interpretation developed in civil law jurisprudence and traceable back to commentators on the sources of Roman law. "We call interpretation of the law," states the textbook of 1938, "the determination of the true content and meaning of a legal provision in connection with a given concrete (factual) relation." [66] Likewise, according to the textbook of 1944, the interpretation of laws is defined as "clarification of the meaning and content of the law necessary for its application." [67] The textbooks set forth the traditional methods. Thus we find the grammatical method which seeks to establish the literal meaning of a provision, the logical method which operates with analysis of the concepts involved; the systematic method which seeks to fix the meaning of a provision in conjunction with other provisions and its place among them, and, finally, the historical method, used when, in order to clarify a provision, a resort is had to the historical conditions under which the law was enacted.[68] There also, the analogy of law (*analogia prava*), that is filling the gaps in legislation, discussed *supra* in Chapter 5 and *infra* 3, and statutory analogy (*analogia zakona*),

[65] 1 Civil Law Textbook (1938) 53.
[66] *Id.* 52.
[67] 1 Civil Law (1944) 38.
[68] *Id.* 38, 39.

the application of a statutory provision to a case similar to that covered by the statute, are mentioned.[69] It may be stated that the soviet discussion of analogy in the interpretation of private law does not differ from the doctrine of civil law countries. But soviet law departs from this doctrine in allowing the use of analogy in the application of penal statutes. From the liberal movement in the criminal law of the eighteenth century evolved a doctrine in European jurisprudence that barred the application of a penal provision by analogy. It called for a strict construction of penal statutes: a penal clause could be applied only to acts specified in the clause. The idea was to protect the citizen from arbitrary prosecution by precluding the imposition of a penalty by the court for an act not specified in advance by the statute as forbidden under penalty. This principle was expressed in all the European criminal codes.[70] However, the soviet criminal codes, those of 1922 and 1926, now in force, did not follow the principle. Both expressly provide for the imposition of a penalty for acts not identical with the crimes specified, but closely resembling them.[71]

Regarding the interpretation of the civil statutes, two restrictive rules should also be mentioned. Both are based upon the provisions of the Law Enacting the

[69] *Id.* 40. Also *op. cit.*, note 65 at 54.

[70] This was also true of the German Criminal Code of 1870, Section 2, until it was amended under Hitler on June 28, 1935, Reichsgesetzblatt, I, 839. See Gsovski, The Statutory Criminal Law of Germany (1947) 3 *et seq.*

[71] The R.S.F.S.R. Criminal Code of 1926, which is in force, provides as follows:

16. If a socially dangerous act [this is the term of the Code for crime] is not directly specified by the Code, the basis and limits of punishment for it shall be determined by applying the sections of the Code which specify the crimes of the kind closely resembling the act.

Similar provisions are contained in Section 10 of the Code of 1922.

Civil Code and deviate from nonsoviet concepts. One rule, designed to interrupt the continuity of the prerevolutionary law, prohibits the interpretation of soviet laws on the basis of prerevolutionary laws and court decisions (Section 6) and is discussed in Chapter 8.

The other rule was intended to exclude a liberal interpretation, by the courts, of the clauses in the soviet Civil Code recognizing private rights so as to benefit capitalist elements. The framers of the soviet Code did not spell out this aim but put it in the form of a rule respecting "extensive interpretation" of law, as follows:

> 5. Extensive interpretation of the R.S.F.S.R. Civil Code is permitted only in case it is required for the protection of the interests of the workers' and peasants' State and the working masses.

The meaning of the term "extensive interpretation" is explained by the soviet textbook of 1938 as follows:

> In the course of the application of a law, the court may arrive at the conclusion that the true meaning of the law must be conceived in a broader sense than its literal terms. This is what we call extensive interpretation.[72]

The explanation in the textbook of 1944 is similar:

> In the course of clarifying the meaning of the law for the purpose of its application, it may be established that the literal content is narrower than that circle of relations to which the legislature considered it expedient to apply a certain rule of law. Such interpretation is called extensive.[73]

This definition does not depart from the standard meaning of the term in civil law countries and is close to our notion of "liberal" interpretation.[74] The novelty

[72] 1 Civil Law Textbook (1938) 52.
[73] 1 Civil Law (1944) 38, 40.
[74] "Extensive interpretation . . . adopts a more comprehensive signification of the word. . . . The civilians divide interpretation into: . . . extensive, whenever the reason of a proposition has a broader sense

of the soviet rule is in the restriction placed upon liberal interpretation. The real purpose of the proviso of Sections 5 and 6, the only sections dealing with interpretation, is to restrict the recognition granted by the Civil Code to only those private rights which are expressly stated in the Code. The framers of the Code wished to bar the extension of guarantees implied in the Civil Code to private rights not foreseen by the Code. In explaining this section, the earlier soviet textbook of 1934 refers to the following opinion expressed during the debate over the Code in the Central Executive Committee:

> It must be stated that this Code is the maximum which is given to capitalism, and we do not intend and do not wish to go any further.[75]

In 1927 Malitsky commented thus:

> The capitalist jurisprudence and court decisions . . . have declared, as a general rule of the application of law in private law in contrast to public law, that "whatever is not prohibited is permitted." This principle of interpretation is not applicable to the soviet Civil Code, because the purpose of the Code is not to stimulate a free and diversified development of private business. On the contrary, its purpose is to create a limit within a firm frame not to be exceeded, "to draw a limit between the satisfaction of the justified needs of every citizen connected with modern business and such abuses of the New Economic Policy as are legalized in all countries but which we do not want to legalize" (Lenin's speech in the debate on the Civil Code). The double nature of the Civil Code, representing a combination of two systems of ownership—communist and capitalist—admits extensive interpretation of the

than its terms, and it is consequently applied to a case which has not been explained. . . ."

Bouvier's Law Dictionary (8th ed. 1914) 2 vols., 1658.

[75] Bulletin of the Fourth Session of the Ninth All-Russian Central Executive Committee (in Russian 1922) No. 3, 16, quoted from Gintsburg, 1 Course 133.

principles and individual provisions of the Code only in the direction of the development of the communist elements . . .[76]

However, the R.S.F.S.R. Supreme Court instructed the soviet courts that resort to Section 5 "is an extreme measure, and its application must always be duly motivated in the decision." [77]

As a matter of fact, effects of the restriction on private rights intended and implied by Section 5 are hardly to be found in the soviet court reports. This provision had a fate similar to that of Section 1 of the Civil Code, a fate explained in Chapter 9, I, 8.

The textbook of 1944 states the provisions of Section 5 without comment.[78]

The soviet textbooks do not contain any statement on the authority of jurisprudential writings (French *doctrine*) in soviet courts, although the role of such writings in the formation of the law of capitalist countries is described.[79]

3. Statutes

The 1938 and 1944 textbooks definitely recognize "the soviet statutes as the primary source of soviet private law." The 1938 textbook considers this to be the direct consequence of "the very nature of the soviet private law as the will of the dictatorship of the proletariat directed toward the socialist construction of social relations," [80] while the 1944 textbook refrains from any explanation. As has been mentioned elsewhere, a soviet statute may originate in many ways. Under the 1936

[76] Malitsky 22–23.
[77] R.S.F.S.R. Supreme Court, Letter of Instruction No. 1, 1927; Nakhimson, Commentary 4.
[78] 1 Civil Law (1944) 40.
[79] *Id.* 28, 29.
[80] 1 Civil Law Textbook (1938) 46; Golunsky, Theory 174 *et seq.*

Constitution, only the acts of the Supreme Soviet are called laws, and the acts of other supreme soviet authorities are supposed to be issued within the limits of such laws. But the practice established under the 1923 Constitution is still continued. At that time, the Congress of Soviets, its Executive Committee, its Presidium, the Council of Ministers (prior to 1946 People's Commissars), and the Council of Labor and Defense, issued enactments called by various names but having binding force equal to that of a statute. At present, laws passed by the Supreme Soviet, edicts (ukases) of the Presidium, resolutions of the Council of Ministers, resolutions of the Economic Council, as well as acts of individual ministers (prior to 1946 people's commissars), enact provisions tantamount to legislation.[81] As a soviet writer remarked, "The boundary line between 'laws' and other sources of law has not necessarily been kept in our civil legislation. Not only directives of the supreme agencies of government but also resolutions of the local authorities and directives of individual government departments are called laws, decrees, resolutions."[82]

In any event, in deciding a case, the soviet civil court is instructed to resort to the legislative enactments and decrees of the central government, as well as to ordinances of the local authorities enacted within their established jurisdiction.[83] Thus, the court may examine the validity of an ordinance of a local authority but may not question the validity of an act of an agency of the central government. In the absence of a law or decree directly bearing upon the case, the court must resort to

[81] See Chapter 2, V, 2, where the examples of legislation by the Presidium are given.

[82] Rubinstein 31.

[83] R.S.F.S.R. Code of Civil Procedure, Section 3.

"the general principles of soviet legislation and general policies" of the government.[84] A Party directive may be cited by the court as the expression of such policies. The soviet court may not refuse to apply a law or an ordinance directly bearing upon the case, suggests the soviet textbook,[85] and, if it has to resort to the general meaning of legislation or to general policy, the court must, according to the instruction of the R.S.F.S.R. Supreme Court, indicate plainly the statutory provisions or the policies of the government upon which it founds its decision.[86] The role played by the soviet courts in the formation of soviet law is discussed *infra,* under Chapter 7.

4. Publication of Statutes: Secret Statutes

Under the imperial law as in force on the eve of the Revolution the rule was that "a legislative enactment shall not be enforced prior to its promulgation." [87] The promulgation was effected by the Ruling Senate, the Supreme Court, by printing in the *Collection of Laws and Decrees of the Government,*[88] a periodical issued since January 1, 1863. The Senate had the power to withhold the publication of a legislative enactment "if the manner in which it was passed does not correspond

[84] *Id.,* Section 4. See Chapter 5, I, 3 at note 18.

[85] 1 Civil Law Textbook (1938) 53.

[86] R.S.F.S.R. Supreme Court, Civil Appellate Division, Letter of Instruction No. 7 of 1926, quoted in Volume II, comment to Section 4 of the Code of Civil Procedure.

[87] Constitutional Laws (Svod Zakonov, Volume I, Part One, 1906 ed.):
86. No new law may be issued without the approval of the State Council and the State Duma and shall not go into force without the ratification by His Majesty the Emperor.
91. The law shall be promulgated for the knowledge of all by the Ruling Senate in a manner established by law and shall not be enforced prior to such promulgation.

[88] Sobranie Uzakonenii i Rasporiazhenii Pravitel'stva.

to the provisions of the Constitutional Laws" [89] and thereby preclude the enforcement of such enactment.

Prior to the establishment of a representative regime in Russia in 1906, a clause in the Constitutional Laws provided somewhat vaguely for a possibility of some laws being kept secret. However, this clause was omitted from the text of the Constitutional Laws as re-edited in 1906 and the requirement of publication of laws was stated without any exception.[90]

After the soviet regime was established the *Collection of Laws and Decrees of the Workers' and Peasants' Government* [91] began to be published. Its title and the issuing body have varied, but as yet there has been no grant of power to check the constitutionality of the

[89] *Lex cit. supra*, note 87:

92. A legislative enactment should not be promulgated if the manner in which it was passed does not correspond to the provisions of the present Constitutional Laws.

[90] Constitutional Law as edited in 1857 and 1892 carried the following provisions:

56. The laws shall be generally kept at the Ruling Senate. Therefore, all laws, even if they are contained in the personal orders by His Majesty given directly to a particular person or office must be deposited in copies by such persons or offices with the Ruling Senate.

Note: Thereupon is based the general regulations by virtue of which a copy of any personal edict of His Majesty given to a particular person must be reported to the Ruling Senate except for edicts subject to a special secrecy.

When the Constitutional Laws were re-edited in 1906, Section 56 became Section 90 with the following text and the note to it was omitted:

90. The laws shall be generally kept at the Ruling Senate. Therefore all the laws must be deposited in the original or in certified copies with the Ruling Senate.

See also Lazarevsky, The Russian Constitutional Law (in Russian 1913) 616.

[91] Sobranie Uzakonenii i Rasporiazhenii Raboche-krestianskago Pravitel'stva R.S.F.S.R. After the formation of the Union the federal acts continued to be published in this collection up to July 1, 1924. They appeared also in Izvestiia and in Ekonomicheskaia Zhizn. But a Vestnik (Messenger) was also founded in 1923 and twenty issues of it appeared in 1923 and 1924. Beginning with September 13, 1924, it was superseded by Sobranie Zakonov i Rasporiazhenii S.S.S.R., a collection of federal laws dated from July 4, 1924.

issuance of a law. Moreover, two acts passed before the adoption of the 1936 Constitution and regulating the publication of the soviet enactments did not require that all the laws be published to become effective. In other words, they expressly provided for a possibility of withholding legislative acts from publication, that is to say, for secret laws. Acts issued prior to the official formation of the Soviet Union in 1923 may be omitted because they were superseded by the Acts of August 22, 1924 and of February 5, 1925.[92] Section 1 of the Act of August 22, 1924, states that the acts passed by the government bodies which at that time exercised legislative and supreme executive power, viz., the Central Executive Committee, its Presidium, the Council of People's Commissars and the Council of Labor and Defense, must be published in the *Collection of Laws and Decrees, Izvestiia,* or *Economic Life,* however, with the exception of the acts "specified in Section 2" of the said act. This section and Section 3, which also deals with the nonpublication of laws, read as follows:

> 2. The following shall not be subject to publication in the *Collection of Laws and Decrees of the Workers' and Peasants' Government of the Union S.S.R.:*
>
> (a) Acts which are withheld from publication by a special order of the Central Executive Committee, its Presidium, the Councils of People's Commissars and of Labor and Defense and their chairmen, the secretary of the Central Executive Committee and the chief of the office of the Council of People's Commissars or the Council of Labor and Defense of the Union S.S.R.;
>
> (b) Resolutions of administrative and economico-administrative nature passed by the Central Executive Committee, its Presidium, the Council of the People's Commissars and the Council of Labor and Defense, the

[92] U.S.S.R. Laws 1924, text 71; *id.* 1925, text 75.

publication of which is recognized superfluous in a manner provided for in Section 3 because they are of no general significance.

3. A resolution shall be classed with the category (b) of Section 2 by the secretary of the Central Executive Committee regarding the resolutions of this Committee and its Presidium, and by the chief of the office of the Council of People's Commissars or the Council of Labor and Defense regarding the resolutions of these Councils.

4. In the minutes and on the originals of the resolutions, the copies of which or excerpts from which are distributed, an inscription shall be made stating whether it is subject to publication under Section 1 or not subject to publication under Section 2, viz., "subject to publication in the Collection of Laws" regarding decrees and resolutions specified in Section 1; "not subject to publication" regarding decrees and resolutions specified in subsection (a) of Section 2; and "its publication is not required" regarding the resolutions specified in subsection (b) of Section 2.

Again the Act of February 6, 1925, which defines the date on which a law goes into effect in instances where no such date is specified by the law itself, expressly provides for the existence of secret laws in the Soviet Union. These provisions are as follows:

1. Resolutions of the Central Executive Committee, its Presidium, the Council of People's Commissars and the Council of Labor and Defense published in the *Collection of Laws and Decrees of the U.S.S.R. Workers' and Peasants' Government,* in *Izvestiia TSIK of the U.S.S.R. and VTSIK* and in the newspaper *Ekonomicheskaia Zhizn,* shall take effect in the capitals of the constituent republics and their counties on the day when the publication is received by the central executive committee of the republic; in the provincial cities as well as the counties of such cities on the day the publication is received by the provincial executive committee; in all other cities and counties on the day when the publication is received by the county executive committee.

5. Resolutions not subject to promulgation shall have binding force from the moment they are received by offices to which they are communicated.

Under the new Constitution of 1936 the place of the Central Executive Committee and its Presidium is taken by a bicameral Supreme Soviet and its Presidium. The Council of Labor and Defense came to an end but later an Economic Council was established. The Council of People's Commissars remained and in 1946 its name was changed to the Council of Ministers. However, the Supreme Soviet alone is designated by the Constitution as a legislative body. Only its acts are technically called laws and the Constitution states that they are considered in effect when passed by both houses.[93] Thus no promulgation is required for their effect. Since the enactment of the 1936 Constitution, two periodical publications containing statutes have been issued: *Vedomosti* (Messenger) of the Supreme Soviet, in which only the acts of this Soviet and the edicts of its Presidium are printed, and the former *Collection of Laws and Decrees* under the changed title of *Collection of Resolutions* (*Postanovlenii*) *and Decrees,* which contains only the acts passed by the Council of Ministers and by the Economic Councils.

No new legislation was enacted concerning the publication or nonpublication of laws, but the practice of withholding of certain acts from printing in the above publications continues. Thus, beginning with the trial of Germans who committed atrocities and their Russian collaborators, that took place in Krasnodar on July 14 to 17, 1943,[94] several sentences were rendered and made public, condemning to the death penalty by hanging and not by shooting as provided for in the Criminal Code,

[93] U.S.S.R. Constitution of 1936, Section 39.

[94] The Trial in the Case of the Atrocities Committed by the German Fascist Invaders and Their Accomplices in Krasnodar, July 14–17, 1943 (Moscow 1943) 40.

Section 21. The collaborators were sentenced to "penal servitude" (*Katorga*) and not simply to imprisonment, as is also provided in the Criminal Code. In all these instances the sentences referred to crime and penalties "provided for in the Edict of the U.S.S.R. Presidium of April 19, 1943." However, no such edict was printed in 1943 nor in any subsequent year in *Vedomosti.* An exposé of the provisions of the edict is to be found in the textbook of criminal law, special part, 1944.[95] Likewise, the Edict of June 22, 1944 (see Vol. II, No. 9) dealing with the nationality of members of the Polish army formed in the Soviet Union refers to the Edict of November 20, 1939, by which the nationality of residents of Polish provinces incorporated into the Soviet Union in 1939 was defined. However, the edict referred to was never printed in *Vedomosti.* Likewise, several acts of the Council of Commissars, not to be found in the *Collection of Resolutions and Decrees,* also are referred to, quoted, or are printed elsewhere.[96]

Thus it may be stated that the earlier soviet statutes expressly provide for a possibility of secret statutes, that is to say, statutes officially withheld from publication, and that recent practices give ample examples of withholding of important statutes from printing in the official law gazettes.

5. Custom

The soviet jurists have professed a distinct contempt for customary law, which in their eyes represents the

[95] Criminal Law, General Part, Goliakov, editor (in Russian 1943) 228; *id.*, Special Part (in Russian 1944) 44.

[96] E.g., Decree of the Council of People's Commissars of July 2, 1941, Concerning the Military Training of Civilian Population and several decrees of the same body affecting wages. See Chapter 22, III.

mentality of the old world. However, customary law had to be admitted in certain fields. Stuchka, one of the first Commissars for Justice and for a time a leading authority on private law, wrote in 1927 as follows:

> It seems to be obvious that the awakening proletariat must take a negative attitude towards the old customs. . . . Yet the question appeared to be more intricate than one would expect. We overcame the written law of the old regime easily, and yet the old law was quite persistent in the form of customary law. It still dominates amidst the peasants, though it is losing its power; we recognize it there insofar as it is irrelevant to our revolutionary law and insofar as the peasants do not want to give it up voluntarily [written prior to the collectivization of agriculture, V.G.]. We admit customs to some extent in commercial transactions, but this is done for purely practical reasons. We leave to them a limited sphere in civil law, viz., we permit reference to the abrogated laws, but only in the interests of the toilers or the State. There is no place for the old custom in labor relations and in the sphere of public economy. Nor is there a place for it in theory, because our revolutionary law is deduced from the development, i.e., from the dynamics, of economic relations and from the revolutionary decree as an organized form of the bearing which the vanguard of the labor class, i.e., the soviet government, exercises upon social relations on a nationwide scale.[97]

The same cautious attitude, but a more definite formula, is to be found in the textbook of 1938:

> Under the soviet legislation, custom cannot in itself constitute an independent source of law. Custom may apply only in instances expressly provided for by statute, with the proviso that such custom is not contrary to law.[98]

A sober and pragmatic attitude is shown in a recent

[97] Stuchka, 1 Course of Civil Law (in Russian 1st ed. 1924, 2d ed. 1931) 188. Likewise, Gintsburg stated in 1935:

> The importance of custom within the proletarian State under the revolutionary reconstruction of all social relations is reduced to a minimum. Gintsburg, 1 Course 128.

[98] 1 Civil Law Textbook (1938) 46.

monograph by Golunsky, who foresees the possibility of the development of a soviet customary law:

> The question of the significance of customs in a socialist society is complex. On the one hand, a number of customs representing the remnants of feudalism and tribal organization are undoubtedly incongruous with the socialist concept of law. . . . Against such customs our socialist law has carried on an incessant struggle. . . . But there is no doubt that, on the basis of the new socialist conditions of labor and life, a number of new customs and rules of community life will be created, and these shall have a different meaning. In many instances, customs serve as a necessary supplement to the statutes. . . . It is obvious that it would be impossible to exclude such customs and rules of community life. . . .
>
> Only the sanction of the government power transforms a custom into a rule of law. This sanction may be given in various forms: in the form of a statute, in the form of a court decision, and in the form of a regulation by a local soviet. Under such sanction, the customs of our soviet people are transformed into a part of our socialist law, without losing thereby the nature of customs.[99]

The textbook of 1944 enters into more detail and makes suggestions reminding one of the imperial legislation concerning customs in peasant and commercial matters. The general rule is, according to the textbook, that "custom may not repeal the statute or be contrary to the statute." Like the rules of statutory law, the rules of customary law may be of a mandatory or optional character (*jus dispositivum*), that is to say, they may exclude any contrary agreement of the parties or apply only in the absence of such agreement. Custom is effective only in the absence of a statutory rule, mandatory or optional; an optional statutory rule has priority over custom. If the statute expressly refers to the custom, then the customary rule takes effect even against the will of the parties. But in the absence of any rule

[99] Golunsky, "Custom and the Law" (1939) Soviet State No. 3, 54.

of law and any agreement of the parties, a customary rule may apply, according to the textbook, even if the statute does not refer to custom. Undoubtedly, this discussion shows a more favorable attitude to custom in the theoretic writings.[100]

In any event, thus far there have been only a few instances where the soviet statutes refer to customs. Thus, under Sections 89 and 90 of the U.S.S.R. Maritime Code of 1929, in the absence of an agreement by the parties to a shipping contract, the time necessary for loading, the stay in harbor, and the amount of payment are determined by the terms and rules customary in the port concerned.[101] The customs of the main ports of the U.S.S.R. have been described and certified by the All-Union Chamber of Commerce and are each known as the customary law of such and such a port (Leningrad, Murmansk, Odessa, and the like).[102]

Sections 8, 55, and 77 of the R.S.F.S.R. Land Code also refer to local custom. Sections 8 and 55 instruct the village communes (*mir*) to apply local customs in the management of communal affairs, in addition to the Land Code and other statutes, provided such customs are not contrary to law. Since the liquidation of the village communes, it has been an open question whether the collective farms and village soviets which took their place may also apply local customs.[103]

6. Court Decisions

The significance of judicial decisions as a source of law is discussed in the following chapter.

[100] 1 Civil Law (1944) 35.
[101] U.S.S.R. Laws 1929, text 366.
[102] 1 Civil Law Textbook (1938) 50.
[103] *Id.* 51. For translation of Land Code, see Vol. II, No. 31.

Chapter 7

Role of the Judiciary

I. Soviet Concept of the Judiciary

1. Administration of Justice Before 1922 and by Non-judicial Bodies

A soviet judicial system was first established only with the advent of the New Economic Policy in 1922.[1] Previously, the people's courts, which were designed to take the place of all the prerevolutionary courts, which had been abolished *en bloc*,[2] were under constant reorganization. According to the soviet writers, out of five decrees on the judicial organization announced in the course of one year (1917–1918), three were not even enforced and two later decrees were enforced only to a limited extent.[3] The courts tried chiefly minor offenses and occasionally divorces, while the major part

[1] The R.S.F.S.R. Judiciary Act of October 31, 1923 (R.S.F.S.R. Laws 1923, text 902). In 1924, the federal basic principles of the judicial organization were adopted (U.S.S.R. Laws 1924, text 203) and, in conformity with these, the R.S.F.S.R. Judiciary Act of November 19, 1926 (R.S.F.S.R. Laws, text 624), which remained in force until 1938, was enacted.

[2] R.S.F.S.R Laws 1917–1918, text 50.

[3] Decree No. 1 on the Courts of November 24, 1917 (R.S.F.S.R. Laws 1917–1918, text 50) was carried out only to a certain extent. Similar decrees, Nos. 2 and 3, issued in February and July, 1918 (*id.*, text 420, numbered in the reprint ed. 347, and text 589), as well as the Instruction on Organization and Functioning of the People's Courts of July 23, 1918; (*id.*, text 597), were never enforced, according to Krylenko, The Judiciary of the R.S.F.S.R. (in Russian 1923) 60, 62. Two later Statutes on the People's Courts, viz., of November 30, 1918 (*id.*, text 889) and of October 21, 1920 (*id.* 1920, text 407), and the Statute on Local Agencies of the Commissariat for Justice of August 21, 1920 (Krylenko, *op. cit.* 265) were carried out only to a limited extent.

of criminal jurisdiction was absorbed by so-called revolutionary tribunals and the Cheka, both institutions proceeding without the guidance of any definite substantive or adjective law.[4]

(a) *Cheka.* "Cheka" is a coined word made out of the beginning letters of the Russian equivalent for "Extraordinary Commission" (*Chrezvychainaya Komissiya,* abridged *Chrezvychayka*). By Cheka is meant the Extraordinary Commission for the Combat of Counterrevolution, Sabotage, and Breach of Duty by Officials (full name in Russian, *Chrezvychaynaya Komissiya po borbe s kontr-revolutsiey, sabotajem i prestupleniyami po doljnosti*), which came into being in December, 1917, as a commission attached to the Council of People's Commissars. The word *Vecheka* or *Vchk* designates the central, all-Russian (*Vserossiyskaya*) Cheka, as distinct from the local chekas, extraordinary commissions of the local soviets. No official decree establishing this institution was ever made public.[5] In fact, it enjoyed an unlimited power of penal prosecution. Krylenko, former Commissar for Justice, characterized the Cheka's activities as follows:

> The Cheka established a *de facto* method of deciding cases without judicial procedure. . . . In a number of places, the Cheka assumed not only the right of final decision but also the right of control over the court. Its activities had the character of tremendously merciless repression and complete secrecy as to what occurred within its walls. . . . Final decisions over life and death with no appeal from them . . . were passed . . . with no rules settling the jurisdiction or procedure.[6]

[4] See *infra,* notes 8–10.

[5] Twenty Years, Vchk-Ogpu-Nkvd (in Russian 1938) 10, note 1. The "statute" on Cheka was promulgated on November 2, 1918 (R.S.F.S.R. Laws 1917–1918, text 842), but its jurisdiction remained undefined.

[6] Krylenko, The Judiciary of the R.S.F.S.R. (in Russian 1923) 97, 322–323.

Latsis, one of the leaders of the Cheka, wrote in his survey of its activities:

> Not being a judicial body, the Cheka's acts are of an administrative character. . . . It does not judge the enemy but strikes. . . . The most extreme measure is shooting. . . . The second is isolation in concentration camps. . . . The third measure is confiscation of property. . . . The counter-revolutionaries are active in all spheres of life. . . . Consequently, there is no sphere of life in which the Cheka does not work. It looks after military matters, food supply, education . . . etc. In its activities, the Cheka has endeavored to produce such an impression on the people that the mere mention of the name Cheka would destroy the desire to sabotage, to extort, and to plot.[7]

(b) *Revolutionary tribunals.* Revolutionary tribunals existed apart from the people's courts. Some of them were connected with the Cheka, others were not; but all of them had an indefinite jurisdiction over major crimes. "In the jurisdiction of the [revolutionary] tribunals," said Krylenko, "complete liberty of repression was advocated, while sentencing to death by shooting was a matter of everyday practice." [8]

The tribunals were "not bound by anything in the selection of punishment" and by no judicial procedure [9] and were instructed to be guided "exclusively by the circumstances of the case and the revolutionary conscience." [10]

(c) *Gpu—Ogpu.* With the advent of the more liberal New Economic Policy, the people's courts and the revolutionary tribunals were fused into a new judicial

[7] Latsis, Extraordinary Commission for the Combat of Counterrevolution (in Russian 1921) 8, 15, 23, 24.

[8] Krylenko, *op. cit.* 205.

[9] Decree of February 17, 1919, R.S.F.S.R. Laws 1919, text 130, Section 4; *id.*, text 132, Section 1; *id.* 1920, text 115, Section 1.

[10] R.S.F.S.R. Laws 1919, text 504, Sections 1, 3; *id.*, text 543, Section 33; *id.*, text 132, Section 25; *id.* 1920, text 115, Section 29.

system, but the imposition of punishment in a non-judicial procedure did not come to an end. "The Courts," stated Lenin, "shall not do away with terrorism; to promise such a thing would mean to cheat either ourselves or other people." He considered this statement to be "a frank and fundamental, a politically true (and not a legalistically narrow-minded) statement."[11] Thus up to the present time imposition of heavy penalties by nonjudicial bodies is a part of the soviet penal system. However, the institution charged with such matters underwent several changes.

The revision of the statutes on the Cheka was ordered on December 30, 1921,[12] and the Cheka was abolished on February 6, 1922,[13] but its functions were assigned to a newly created Gpu (*Gosudarstvennoe Politicheskoe Upravlenie,* State Political Administration), a department of the R.S.F.S.R. Commissariat for the Interior. When, in 1923, the Soviet Union (U.S.S.R.) was formed, a federal Ogpu ("O" stands for *obyedinennoe*—federal) was created.[14] In fact, the R.S.F.S.R. Cheka was reorganized into the R.S.F.S.R. Gpu, and the latter was transformed into a federal institution—the Ogpu. The head of the Cheka, Dzerziuski, became the head of the Gpu and, later, of the Ogpu. Several statutes on the Cheka, Gpu, and Ogpu failed to set up any definite limitation to the power of this institution to deal with offenses and impose punishments.[15] The unlimited power of the Ogpu of putting to

[11] Lenin, 27 Collected Works (Russian 2d ed. 1929–1932) 296.
[12] R.S.F.S.R. Laws 1922, text 22.
[13] *Id.*, text 160.
[14] U.S.S.R. Constitution 1923, Section 61; Decree of November 15, 1923; (1923) Messenger (Vestnik) of the Central Executive Committee No. 8, text 225.
[15] Re Cheka, see R.S.F.S.R. Laws 1917–1918, text 842; *id.* 1919, texts 130, 301, 504; *id.* 1920, texts 115, 190, 214, 370; re GPU and Ogpu, see

death was neither stated nor denied until an *ex post facto* authentic interpretation of a previous law on March 14, 1923, sanctioned such activities of the Ogpu.[16] Three days before the date of this interpretation, a death sentence, rendered by the Ogpu in the case of thirty-six persons, was officially promulgated.[17]

In connection with the Five-Year Plan, the Ogpu developed a new policy, viz., the employment of convict labor on a large scale. Persons sentenced by the Ogpu and by courts to imprisonment for three years and over were confined in "correctional labor camps" managed by the Ogpu.[18] The decree concerning the amnesty to those convicted to such camps and engaged in the construction of the Belomorsk Canal after its completion may offer an idea of the number of such convicts. Amnesty was granted to a total of 72,000 persons, of whom 12,-

R.S.F.S.R. Laws 1922, texts 42 (which was never carried out), 160, 646, 844; (1923) Messenger (Vestnik) text 225.

16 U.S.S.R. Laws 1933, text 108.

17 Izvestiia, March 12, 1933, No. 70. This is the text of the announcement, which is the only public record in the case:

From the Ogpu: By virtue of the Resolution of the Central Executive Committee of the U.S.S.R. of November 15, 1923, the judicial collegium of the Ogpu, after deliberations on March 11, 1933, upon the case of the prisoner employees in the government service under the People's Commissariat for Agriculture and for the State Farming, who descended from bourgeoisie and nobility and were accused of the counterrevolutionary subversive activities in agriculture occurring in various districts of the Ukraine, the North Caucasus, and White Russia—

Resolved to sentence—

for the organization of subversive activities in the government Machine-Tractor Stations and in government farms of some regions of the Ukraine, the North Caucasus, and White Russia, that damaged the peasantry and the State, and were accomplished by wreckage and destruction of tractors and implements, by intentional pollution of the fields, by burning of the Machine-Tractor Stations, the repair shops, and the flax plants, by the disorganization of sowing, harvesting and threshing, with the aim to shatter the material standing of the peasantry and to create a famine in the country—

The following most active members of the organization *to be shot* (36 names are mentioned); the following (22 names) to be confined for 10 years; the following (22 names) to be confined for eight years.

The sentence has been executed.

18 Statute on Correctional Labor Camps, U.S.S.R. Laws 1930, text 248; also, From Prisons to Educational Institutions (in Russian 1937) 121.

484 were pardoned and 59,516 had their terms reduced.[19] There were, of course, those who did not obtain any pardon and those who perished in this titanic work in sub-Arctic climate. This is one among many projects carried on by the Ogpu and later by the *Narkomvnudel.*

When, in 1932, a passport system was introduced, subjecting the right of residence in many places to the discretion of the police, the Ogpu was granted supervisory powers over enforcement of the passport regulations and its personnel was charged with the appertaining duties.[20]

(d) *Narkomvnudel—NVD.* In 1934, the Ogpu was transformed into a federal People's Commissariat for the Interior (*Narodny Komisariat Vnutrennikh Del,* in abbreviated form *Narkomvnudel*), and its jurisdiction was defined by two Statutes dated July 10, 1934,[21] and Statutes of September 17, October 27, and November 5, 1934, September 21 and October 28, 1935.[22] These statutes assign to the *Narkomvnudel* several functions: like the Ogpu, it performs the function of a secret police, of investigator of all crimes, of protector of the frontiers (frontier guard),[23] and it can sentence in a non-judicial procedure and supervise the enforcement of passport regulations. Moreover, it is in charge of all

[19] Decree of August 4, 1933, U.S.S.R. Laws 1933, text 294. It is interesting to note in this connection that the highest number of convicts serving hard labor under the imperial regime was recorded in 1913, when it reached 32,000 for the whole of Russia. See Hard Labor in Siberia, excerpt from the report of P. K. Grin, the Chief of the Main Bureau of Prisons, for 1913 (in Russian 1913) 4. The highest number of political exiles without confinement under the imperial regime was reached, according to the soviet writers, in 1907 and amounted to 17,000. See The Soviet Penal Repression (in Russian 1934) 108.

[20] U.S.S.R. Laws 1932, text 516; *id.* 1933, text 22; *id.* 1940, text 591 (statute on passports).

[21] *Id.* 1934, texts 283, 284.

[22] *Id.*, texts 372, 421; *id.* 1935, texts 84, 432, 452.

[23] *Id.* 1934, text 283, Section 2, subsection (d).

penal institutions,[24] convoy troops,[25] of Civil Registry Offices (Vital Statistics), and the regular police.[26] It is also in charge of special military units—troops of internal security or *Vokhra* (*Voiska Vnutrenney Okhrany*), and of administration of highways.[27] A soviet legal dictionary, published in 1945, describes the branches of public administration brought under the Ministry of the Interior (the successor to the *Narkomvnudel*) as follows:

> The following are under the jurisdiction of the Ministry of the Interior: camps of correctional labor, prisons and other houses of detention, militarized guards of industrial establishments, militarized fire departments, frontier guards, troops of internal security, convoy troops, police (*militsia*), state and local archives, macadamized and dirt highways of national importance, and special construction projects.[28]

Statutes dealing with the judicial powers of the *Narkomvnudel* are silent on the death penalty; they expressly confer upon the *Narkomvnudel* the authority to confine in a "labor camp," a sentence equal to hard labor, for a period of up to five years, or to exile to a definite locality with or without confinement, or to prohibit residence in certain places for the same period, or to banish from the Soviet Union.[29] There are unlimited

[24] *Id.*, text 421.
[25] *Id.*, text 372.
[26] *Id.* 1934, text 283, Section 2, subsection (c), Section 3, subsection (c); *id.* 1935, text 432.
[27] Re troops see *id.* 1936, text 240*b*; re administration of highways, see *id.* 1935, text 452.
Evtikhiev, Administrative Law (in Russian 1946) 191, 324, adds to this the administration of surveying and map service (U.S.S.R. Laws 1935, text 499), forest protection (*id.* 1935, text 13), certain aspects of colonization (migration), weights and measures, and "some other functions."
[28] Short Legal Dictionary (in Russian 1945) 182. For the most up-to-date comprehensive survey of the role of correctional labor camps in the Soviet Union, see Dallin and Nikolaevsky, Forced Labor in Soviet Russia (New Haven 1947), also Mora, Giustizia Sovietica (Roma 1945).
[29] *Id.* 1934, text 283, Section 8; *id.* 1935, text 84, Section 1. For the trans-

facilities for the prolongation of these terms. The *Narkomvnudel* may undertake an investigation and arrest on any criminal charge. After the investigation is complete, it may either dispose of the case by inflicting one of the above-mentioned penalties or transfer the case for trial in court. Statutory provisions do not specify any limitation to the discretion of the organization in the selection of a judicial or nonjudicial determination of a case. However, not all the cases transferred are triable by regular courts. Those involving "subversive activities" must be tried by court-martial, and those involving crimes committed on railways and inland waterways must be tried by the special courts established for this purpose, which, during World War II, were replaced by courts-martial.[30]

During the war, the *Narkomvnudel* was subdivided into two commissariats, one bearing the old name and another the name of Commissariat for Security, but both were again merged under the old name, and again separated. In 1946 they were renamed ministries together with other commissariats. The penal functions remain with the Ministry of the Interior.[31]

2. Early Principle of Class Justice

When the new courts were organized in 1922, "the idea borrowed from the revolutionary tribunals that the court is, in the first place, an organ of protection of the interests of the ruling class and of a given social

lation, see Chapter 23 at p. 845. The death penalty in peacetime was abolished by the Edict of May 26, 1947, being replaced by confinement in correctional labor camps for a period of 25 years.

For special powers regarding minors, see *supra*, Chapter 4 at note 49.

[30] U.S.S.R. Laws 1934, text 284, Section 7; *id.*, text 283, Article I, Section 2; Edict of June 22, 1941, Vedomosti 1941, No. 29.

[31] Studenikin, The Soviet Administrative Law (in Russian 1945) 105.

order" served as a guiding principle, according to Krylenko.[32] The doctrine of impartiality and independence of the judge was repudiated by the soviet jurists. They denied that there was ever an impartial or independent court and opposed their doctrine of "class justice" to the traditional concept. However, the soviet doctrine underwent substantial modifications, and it seems that the desire to have better administration of justice forced in the long run the recognition, at least in theory, of the impartiality, objectivity, and independence of the judge as a prerequisite to a normally functioning judiciary.

Krylenko was the foremost author of works on the soviet judiciary until the 1930's, and his theory of the court in general, and the soviet court in particular, was as follows:

> No court was ever above class interests, and if there were such a court, we would not care for it . . . The court is, and still remains, the only thing it can be by its nature as an organ of the government power—a weapon for the safeguarding of the interests of a given ruling class . . . A club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court . . . For us there is no difference between a court of law and summary justice. A court is merely a better organized form which warrants a minimum of possible mistakes and better evidence of the fact of the crime.[33]
>
> The court is an organ of State administration and as such does not differ in its nature from any other organs of administration which are designed, as the court is, to carry out one and the same governmental policy . . . our judge is above all a politician, a worker in the political field . . . and therefore he must know what the government wants and guide his work accordingly . . . therefore, the court must be organized so that there is the possibility of directing the judg-

32 Krylenko, The Judiciary of the R.S.F.S.R. (in Russian 1923) 206.
33 *Id.* 9, 10, 15, 16, 559.

ment in conformity with the aims of State policy pursued by the government . . . We look at the court as a class institution, as an organ of government power, and we erect it as an organ completely under the control of the vanguard of the working class . . . Our court is not an organ independent of governmental power . . . therefore, it cannot be organized in any way other than as dependent upon and removable by the soviet power.[34]

3. Qualifications of Soviet Judges

In accordance with these concepts, all efforts were made to recruit the bench from among communists. They constituted 86.4 per cent of the judges of the higher courts in 1928, 89.7 per cent in 1930, and 99.6 per cent in 1935; the percentage of communists among the judges of the lower courts constituted 69.8 per cent in 1928, 74.8 per cent in 1930, and 95.5 per cent in 1935.[35] On the other hand, no legal education is required by statute for a judgeship,[36] and the level of education of a soviet professional judge is on a rather low level, as is evidenced by the available official statistics. Thus, in 1928, only five to six per cent of the judges had higher education, and 82.7 per cent had merely elementary education.[37] The figures, referring to 1935 and 1936, show that only 5.8 per cent of the soviet judges were graduates of regular law schools, 1.8 per cent had had a one-year course in law, and 41.7 per cent had had only a six-month course in law; so that 51.1 per cent had no legal training at all. Moreover, 62.2 per cent of all the judges of the higher courts had had barely elementary

[34] *Id.* 27, 42; *id.*, Fundamentals of the Judiciary of the U.S.S.R. and the Constituent Republics (in Russian 1927) 14, 15.

[35] From Congress to Congress, the Report of the Soviet Government (in Russian 1930) 23; (1935) Soviet Justice No. 35, 4–5.

[36] Judiciary Act of 1926, Sections 15, 41; *id.* 1938, Section 11.

[37] Zelitch, Soviet Administration of Criminal Law (Philadelphia 1931) 330.

educations, while in the lower courts this percentage was as high as 84.6 per cent.[38]

There has been only a slight improvement since that time. Thus, the federal Minister of Justice complained in 1947 that:

> The number of specialists graduated from higher or secondary schools who are employed in the judicial bodies controlled by the Ministry of Justice is insignificant. . . . There are many regions, provinces, and autonomous republics where all the people's judges have no higher education.[39]

The resolution adopted by the convention of soviet jurists at the same time is more explicit. It states:

> Among the leading administrative officials whose duties are connected with the administration of justice and the judges, only 14.6 per cent have legal education on the university level and 21.8 per cent received legal training in secondary schools. . . .[40]

Thus, about 64 per cent of soviet judges seem to lack any legal training whatsoever.

Prior to the 1938 Judiciary Act, a judge could be removed from office in a disciplinary procedure if his judgments were reversed by the Supreme Court as "being obviously in discord with the general meaning of the soviet laws or the interests of the toilers."[41] Judges were also subject to removal from office by the Commission of Soviet Control, which was a federal government bureau supervising the accounting, loyalty, and efficiency of soviet public officials. Removal from office,

38 Berman, "Concerning Legal Education" (1936) Soviet State No. 5, 115; (1935) Soviet Justice No. 35, 4–5. Figures available for one republic, the Azerbaijan, show in 1939 a great improvement: twenty-five per cent of the judges had higher legal education and 91 per cent at least some legal training. (1939) Soviet Justice No. 14, 25.

39 (1947) Socialist Legality No. 2, 4, 5.

40 *Id.* 11.

41 Judiciary Act of 1926, Section 192, subsection (c).

transfer to a lower office, or warnings were frequently visited upon judges by this Commission for various reasons, and the Supreme Court simply carried out the suggestions of the Commission.[42] The term of office of a judge was, until 1938, very short—one year, and is only three or five years at present.[43]

4. Administration of Justice by the Soviet Courts

The Supreme Court and the leading judicial officers have incessantly pointed out the violations of elementary rules of procedure by the courts. Thus, the federal Supreme Court stated in a Letter of Instruction of May 27, 1932, that "the practice of the soviet judiciary and investigating authorities shows in numerous instances a careless and malicious attitude of individual officers in the indictment of suspected persons, in the conduct of investigations, in the rendering of judgments, and in

[42] Below are some extracts from decisions of this Commission. A resolution of the Commission of Soviet Control concerning the courts of the North Caucasus (1935) states:

(1) The President of the regional court . . . shall be removed and transferred to a lower office.

(2) Judge M. A. shall be discharged and brought before the court . . . ; district prosecutor . . . shall be discharged and brought before the court . . . Judge . . . shall be discharged and prohibited to work in soviet judicial bodies. (1935) Soviet Justice No. 25, 3.

A Resolution of the Commission of October 5, 1935, concerning the courts of the Kuibyshev region states:

. . . The President of the regional court shall be subject to public censure . . . the President of the appellate division of the same court shall be subject to public censure, and the Supreme Court shall be requested to transfer him to a lower office . . . Judge N. shall be discharged and prohibited to hold any responsible post for a period of two years . . . the President of the Supreme Court . . . and the Attorney General of the R.S.F.S.R. shall be ordered to remove all the indicated defects of the activities of the courts and to punish those judges who are guilty.

On October 15, 1935, the R.S.F.S.R. Supreme Court passed a resolution whereby, "in execution of the resolution of the Commission of Soviet Control," it inflicted a number of punishments. (1935) Soviet Justice No. 30, 1–2.

[43] 1926 Judiciary Act, Sections 15, 41; *id.* 1938, Sections 22, 30, 38, 46. See Volume II, No. 36.

the sentencing of prisoners."[44] In 1934, the Plenary Session of the same court complained of a high number of acquittals and cases dismissed by the higher courts:

> Due to faulty proceedings in the lower courts . . . At best, the lower courts are satisfied with a mechanical summons of witnesses for the prosecution, blindly refusing without reason to summon witnesses additionally named by the attorney for the defense; in many instances the courts try the cases without summoning witnesses, relying upon their written depositions . . . do not record in detail and with accuracy the motions and testimonies of the persons examined by the court and the motions of the parties, or record them in an extremely abridged form according to the discretion of the recorder. . . . The records are often completely illiterate and made on pieces of dirty, colored paper . . . they are not always signed by the presiding judge . . .
>
> As far as the sentences are concerned:
>
> Concrete and objective exposition of the findings of the court is replaced by declarations and abstract reasoning on general political subjects; no evidence is mentioned which would prove that the prisoner committed the crime of which he is accused; the crimes themselves are indicated in general legal terms without concrete explanation of when and where the acts, and what kind of acts, were committed; the conclusion as to the qualification of the act is not well-founded; the guilt of partners in crime is not sufficiently individualized.

All this, according to the Supreme Court, "deprives the sentence of any persuasiveness for the person sentenced and for the toilers."[45]

Certain of the shortcomings observed then by the Supreme Court in the discharge by judges of their duties seemed to be still in evidence in 1942. At least in a survey of enforcement by the courts of the Edict of June 26, 1940, penalizing absenteeism and unauthorized quitting

[44] Rulings and Decisions of the U.S.S.R. Supreme Court (in Russian 1932) No. 26, 19.

[45] (1934) Socialist Legality No. 8, 32, 34.

of a job, the U.S.S.R. Supreme Court complained on October 22, 1942, of:

> . . . Erroneous application of law, which frequently occurs in the judicial practice and is especially inadmissible in time of war . . . Unfounded acquittals and unfounded convictions appear in many instances as a result of inadequate investigation of the facts in the case. . . . Some courts decide cases on the basis of the testimony of the defendant, relying on it without sufficient reasons; others, on the contrary, by-pass his defenses, paying no attention to them. . . . Although the law requires that the place and time of the commission of the offense, the mode of its commission and other essential elements of crime be precisely indicated in the sentence, sentences frequently do not specify when the absenteeism occurred and what particular acts formed it.[46]

Vyshinsky stated in 1934, when he was federal deputy attorney general:

> Unfortunately, it often happens in the practice of our courts that the court holds the hearing of ten to twenty cases at the same time, then withdraws to the conference room and announces simultaneously the ten to twenty sentences pertaining to all these cases: John gets five years, Peter ten years, Theodor three years. What for and why? The court has no time to answer such questions. Moreover, in certain instances, the court confuses the names and the punishments. This happens, unfortunately, quite often.[47]

[46] U.S.S.R. Supreme Court, Plenary Session, Directive Ruling of October 22, 1942, No. 18/M/20/y. 2 Judicial Practice of the U.S.S.R. Supreme Court for 1942 (in Russian 1943) 1, 2, 3.

[47] Akulov and Vyshinsky, For the Reorganization and Improvement of the Work of the Courts and the Prosecuting Staff (in Russian 1934) 35. The same authors also report the following facts: the brain of a man who committed suicide after having murdered his wife was sent by an investigating judge to the Experimental Institute for the purpose of ascertaining the psychic state of the murderer at the time he committed the murder (*id.* 39). Another judge himself performed the medical inspection and recorded the following findings:

> The murder must have been committed with a blunt instrument, a knife or a hay-fork, not by one murderer but at least two. Death occurred, in my opinion, from extravasation of the brain resulting from striking with iron and bleeding (*id.*).

The indictment described the place of the act as follows:

The reports of the officers sent by the central government to investigate the activities of the courts contained statements like this: "We find at every step evidence of inadmissible disregard of law by those, strange as it may seem, who are called to safeguard revolutionary legality." [48]

5. Current Theory

Thus, the leaders of the soviet judiciary did not consider the situation satisfactory on the eve of the adoption of the new Constitution in 1936. In 1937, important changes occurred. Krylenko was somehow linked with the Pashukanis school; both were doomed and disappeared from the picture. Krylenko's doctrines on substantive criminal law were condemned.[49] The

The house is situated on the north-southern side fifty meters to the north from the west (*id.*).

The following sentence is quoted:

The court held that Citizen X came to Citizen Z in the barracks and went to bed. During the night X had a dream, he says, that he was attacked by a bear, and X took a knife in self-defense and struck Z, i.e., the visible bear. In fact, he hit Z. On this ground, the court arrived at the conclusion that X committed the offense under Section 139 of the Criminal Code (Bodily Injury), and he was sentenced to imprisonment for one and one half years (*id.* 23).

[48] (1934) Socialist Legality No. 8, 3.

[49] On the eve of his disgrace, Krylenko, like Pashukanis, disavowed some of his previously advanced views as erroneous. Therefore, it is difficult to state what his real point of view was. At one time he, like many other soviet penologists, advocated the elimination of the principle of personal guilt as a basis for the imposition of punishment, and the substitution of a concept of social danger. (The problem of guilt in soviet criminal law is discussed in Chapter 14 on Torts). In 1935, he considered this an error. He suggested then the compilation of a new criminal code which would provide for two different types of retribution for crime, viz., measures of repression for class enemies and educational measures for workers. He later scorned this view also. Finally, he advocated a criminal code which should state only general principles for the imposition of punishment, without giving any legal definition of individual crimes, i.e., without indicating in the statute the factual elements constituting an individual crime, e.g., robbery, larceny, etc. He was also against a definitely settled scale of punishment corresponding to the gravity of the crime committed. For early Krylenko views, see Three Drafts of the Criminal Code, Thesis of the Report by N. V. Krylenko (in Russian 1931) *passim;* also Draft of a New

new Constitution and the Judiciary Act of 1938 carried provisions suggesting a new attitude toward the court. Vyshinsky, the leading writer on questions pertaining to the soviet judicial organization, became Attorney General. He edited a lengthy textbook on the soviet judiciary which appeared in three editions, in 1934, 1936, and 1940, and also edited a textbook on constitutional law, in which the role of the court in the soviet State is discussed at length.[50] Nevertheless, the doctrine of separation of powers is still negated in these works, all of which start with propositions almost identical with those stated by Krylenko and quoted above, and yet certain new conclusions are drawn. As before, the impartiality of any court is denied:

> Capitalist theorists in their works on courts endeavor to picture the court as an institution which is above social classes, is beyond politics, and is guided in its activities not by the interests of the ruling class but presumably by the interests of society as a whole, and presumably by the dictates of law and justice common to all men. Such understanding of the essence and the task of the court is deceptive in its roots. The court has always been a tool in the hands of the ruling class, securing the domination by this class and protecting its interests.[51]

The duties of the court are identical in content with those

R.S.F.S.R. Criminal Code prepared by the Subsection of Criminal Law of the Institute of Law and Soviet Reconstruction of the Communist Academy. Introduction by Krylenko (in Russian 1930) *passim*. For his own criticism of his views, see Krylenko, "The Draft of a Criminal Code of the U.S.S.R." (in Russian 1935) Soviet State No. 1/2, 93 *passim*; *id.*, "The Draft of a Criminal Code" (in Russian 1935) Soviet Justice No. 11, 9 *passim*. See also Hazard, "Reforming Soviet Criminal Law" (1938) 29 Journal of Criminal Law 159.

[50] Vyshinsky and Undrevich, 1 Course of Criminal Procedure, The Judiciary (in Russian 1st ed. 1934, 2d ed. 1936); the 3d edition appeared as The Judiciary of the U.S.S.R. (in Russian 1940); the author of the present work regrets having had no chance to consult it because no copy of it is available in this country. Vyshinsky, editor, The Soviet Constitutional Law (in Russian 1938).

[51] Vyshinsky, The Soviet Constitutional Law (in Russian 1938) 449; *id.*, 1 Course (2d ed. 1936) 20.

of the entire governmental machinery; the court has no specific duty making it different from other agencies of governmental power or constituting its "particular nature." [52]

In accordance with this concept of the role and nature of courts in general, the program for the soviet courts is outlined in the textbooks on the judiciary in the following terms:

> Any court is a class court. . . . While the bourgeoisie tries to conceal from the toilers the class nature of its courts and justice, we openly underscore the class nature of the soviet courts and justice . . . The court of the State of proletarian dictatorship is the court of the working class . . . This class character of the soviet court is expressed in its aims: the liquidation of all remnants of a society divided into classes, of all remnants of capitalism in the economy and in the mind of the people; the purpose of training the people to a communist consciousness, and a merciless fight against all agents of world imperialism and sworn enemies of socialism.[53]
>
> The court of the soviet State is an inseparable part of the whole of the governmental machinery of the proletarian dictatorship. This determines the place of the court in the system of soviet administration . . . This also requires that the entire work of the soviet court be so construed as to secure an unswerving fulfillment of the general Communist Party line by the court . . . The general Party line forms the basis of the entire governmental machinery of the proletarian dictatorship, and it forms also the basis of the work of the soviet court . . . The guidance of judicial activities by the [Communist] Party is expressed in the fact that the Party establishes the general principles of judicial policy, supervises their proper fulfillment, and controls the judicial personnel.[54]
>
> The court is an organic part of the administration. In content, its activity is identical with the activities of other agencies of administration which have the task of protecting and strengthening the revolutionary order . . . It differs from them in the method of performance of this task and in procedure . . . The Ogpu and the courts represent vari-

[52] Vyshinsky, 1 Course (2d ed. 1936) 7–8.
[53] *Id.* 12.
[54] *Id.* 23, 24.

ous forms of the class struggle of the proletarian dictatorship . . . .[55]

Such views seem to be incompatible with the doctrine of independence of the courts, and in both editions of the textbook on the judiciary (1934 and 1936) this doctrine is declared not only useless but directly harmful because it is supposed:

> . . . To acquire, under the conditions of proletarian dictatorship, a counterrevolutionary character. Any attempt to detach the soviet court from the machinery of the proletarian dictatorship is tantamount to an attempt to place the court at the service of another class—the bourgeoisie . . . to an attempt to impose on the court tasks which are not germane to an agency of the proletarian dictatorship.[56]

However, Section 112 of the new 1936 Constitution includes the traditional formula of many constitutions: "The judges shall be independent and subject only to law." This formula implies a notion difficult to reconcile with the concept of the court as an agency of administration "with no specific duties making it different from other agencies of the government power."[57] Nevertheless, an attempt has been made at such a reconciliation by reading into this formula only the court's independence from local influences. Thus, the second edition of the textbook on the judiciary carries the following interpretation:

> The soviet court is subject only to law. But this does not mean that the soviet court is outside politics, outside the struggle to strengthen and render prosperous the soviet regime . . . . It means that the judges of the soviet court, the court of a socialist State of workers and peasants, the court of a socialist State, carry out unswervingly the policy of the proletarian dictatorship as expressed in the statutes of the soviet State, and

[55] *Id.* (1st ed. 1934) 5, (2d ed.) 28, 29.
[56] *Id.* (1st ed. 1934) 11, 14, (2d ed. 1936) 18.
[57] *Id.* (2d ed. 1936) 7–8.

that they carry out this policy regardless of persons and regardless of any "local influences" . . .[58]

However, the textbook on constitutional law of 1938 described the functions of the court in terms suggesting that its "specific nature" is different from that of other government agencies, which was vehemently denied previously, and interpreted the clause of Section 112 of the Constitution along the traditional lines of "inner conviction" of the judge, with adherence to the facts in the case and to statute. Thus, the textbook reads:

> In deciding cases, the court participates in government administration, but it performs this participation in a particular manner different from that in which government administration is performed by other government agencies. This difference is reflected in Section 4 of the U.S.S.R. Judiciary Act of 1938 and consists, first, in the fact that the hearing of cases takes place in a judicial procedure which is public and, secondly, in the fact that in judicial proceedings the parties (prosecutor and accused, plaintiff and defendant) take an active part and the law secures for them all rights necessary for the prosecution of their interests in court.[59]
>
> The provisions of the Constitution concerning the independence of judges have in view the right and duty of the judge to render judgment in each individual case according to his inner conviction, on the basis of his socialist concept of law, in strict accordance with the facts in the case and the dictates of the statute.[60]

In contrast to the original repudiation of the necessity and possibility of the judge's independence, the text-

[58] *Id.* (2d ed.) 21.

The functions of government pertaining to the administration of justice are entrusted to the judicial bodies but it does not mean that such bodies exercise in the U.S.S.R. their judicial power in a sovereign-like manner without being dependent upon any body. Golunsky, "The U.S.S.R. Supreme Soviet and the Judicial Bodies" (1938) 3 Problems of Soviet Law 88.

[59] Soviet Constitutional Law (in Russian 1938) 448.

[60] *Id.* 461.

book claims that soviet judges "are independent in the true and direct meaning of the word." [61]

6. Status of Courts Under the Act on the Judiciary of 1938

The change in theoretic approach to the problem of a good court is obvious. However, the devices which in the eyes of a nonsoviet jurist guarantee the independence of a judge, such as tenure for life on good behavior, are still denied. The guarantee of the independence of soviet judges is seen in that, at present, they are elected for a period of three or five years instead of one, as before 1938, that the people's judges (the judges of the lower courts) are elected by the population [62] and the judges of the higher courts by the soviet representative assemblies, the regional and supreme soviets, and that judges may be removed from office prematurely only by recall by the constituency or by a court judgment in a criminal case, which may be initiated only with the consent of the attorney general of a republic, approved by the presidium of a soviet republic or by that of the U.S.S.R.[63] Such guarantee would not satisfy a nonsoviet jurist. The soviet judges, functioning under such conditions, certainly do not appear to be independent.

Again, although elected, the soviet judge is under the control of the federal Ministry of Justice, the ministry

[61] *Id.* 462. The same views are also expounded in more recent works. e.g., Evtikhiev, *op. cit. supra,* note 27 at 256 *et seq.*

[62] The Judiciary Act of 1938 provides for election of people's judges and assessors directly by population but no statute on such electoral procedure was ever passed. With regard to the assessors, the Order of the U.S.S.R. Commissar for Justice of October 3, 1938, No. 82 recommended electing them until the said statute should be enacted, under the previous regulations, that is, electing them by the district soviets. It seems that the people's judges are elected also by such soviets upon recommendation of the regional bureau of the Ministry of Justice.

[63] *Loc. cit. supra,* note 61.

of justice of a republic, and finally of the so-called regional bureau of the ministry of justice attached to the regional soviet. All these administrative bodies are authorized among other things:

> . . . To check by means of inspection the correctness of application of laws by the people's courts in trying the criminal and civil cases; to submit to the R.S.F.S.R. Commissar for Justice cases which are proven by inspection to have been decided by the people's courts against the law, and the Commissar shall, if the chief of the regional bureau agrees, submit such cases to the President of the R.S.F.S.R. Court for decisions concerning the filing of an appeal in the case.[64]

The ministers of justice and the heads of the regional bureaus of justice are also authorized to impose disciplinary penalties on judges for "violation of labor discipline," or recommend the dismissal of judges to the local soviets and to grant rewards. The presidents of the regional courts have similar rights regarding the judges of the region.[65]

But the theory of the soviet judiciary seems to be tending toward certain principles stated in nonsoviet jurisprudence. It is significant that in the Judiciary Act of 1938, which like its predecessor recites certain general objectives of the soviet court, the "class nature" of the soviet court is not announced with such candor as it was in the textbooks quoted above. In comparison with the Judiciary Act of 1926, it requires from the court more definite protection of socialism but less definite protection of the proletariat or the toilers. Thus, Section

[64] Statute on the Local Bureaus of the R.S.F.S.R. People's Commissariat for Justice of June 1, 1939, Section 3, subsection (a[1]). R.S.F.S.R. Laws 1939, text 26. Statute of June 15 on the U.S.S.R. Commissariat for Justice, U.S.S.R. Laws, text 162, and Statute of November 11, 1939 on the R.S.F.S.R. Commissariat for Justice. printed in Reference Book of the People's Judge (in Russian 1946) 42, 44.

[65] Edict of July 29, 1940, Vedomosti 1940, No. 28. For its translation, see Volume II, No. 37.

2 states that the purpose of the administration of justice in the U.S.S.R. is, among other things, the protection "of the socialist system of economy and socialist property," and Section 3 calls upon the courts "to educate the citizens of the U.S.S.R. . . . in the spirit of devotion to their country and the cause of socialism . . . and in a watchful attitude toward socialist property." [66] The Act of 1926 called upon the courts broadly to protect instead the "conquests of the proletarian revolution." The new act speaks of protection of various personal and property rights "of the citizens of the U.S.S.R." and announces as a matter of principle that justice in the Soviet Union shall be administered "by one and the same court uniformly to all citizens regardless of social, property, or service status" (Section 5). In contrast to these statements, the Act of 1926 promised protection of rights only to "the toilers and their associations," while to the personal and property rights of citizens in general only the application of "revolutionary legality" was guaranteed (Section 1(d)). Instead of using this indefinite formula discussed *supra,* Chapter 5, the Judiciary Act of 1938 stresses that the administration of justice in the U.S.S.R. is also expected "to secure the precise and unswerving execution of the soviet law by all institutions, organizations, officials, and citizens of the U.S.S.R." (Section 2, last paragraph).

Thus, the Judiciary Act of 1938 expresses distinctly the new soviet attitude toward law discussed *supra,* Chapter 5. The soviet laws must be enforced unconditionally. But the doctrine of the "class nature" of the court still professed and stated in the textbooks seems

[66] For a full translation of the Act on the Judiciary of 1938, see Volume II, No. 36.

to be beginning to lose ground. At least, the soviet legislators refrained from writing it into the 1938 statute. Nevertheless, the idea which undermines, in the eyes of a nonsoviet jurist, the soviet understanding of the role of the judiciary, viz., the outright political task assigned by principle to the soviet court, remains the fundamental principle of the soviet judiciary. In a monograph on evidence, which appeared in 1941, Vyshinsky deemed it necessary to stress that:

> Neither court nor criminal procedure is or could be outside politics. This means that the contents and form of judicial activities cannot avoid being subordinated to political class aims and strivings.[67]

There is no use denying that unfortunately, in too many instances, in too many countries, the courts are open to political influences. But what singles out the soviet point of view is that such submission to political purposes is expected from the soviet "independent" judge. This is emphatically stressed in the postwar time. Thus, reviewing the shortcomings of the soviet judges, the present Minister of Justice called in 1947 upon the latter to proceed in the following manner:

> The judge must know how to conduct the court proceedings and how to write the judgment in a manner which shows with the utmost clarity the political significance of the case so that the defendant and those present in the court room see clearly the policy of the government in the court action.[68]

The above survey of soviet views indicates the modest and subordinate role assigned to the soviet court. This has posed a difficult problem to the soviet theorists in defining the place of court decision among the sources

[67] Vyshinsky, The Theory of Evidence in the Soviet Law (in Russian 1941) 31.

[68] (1947) Socialist Legality No. 2, 5.

of soviet law. The soviet writers were not totally original in the formulation of their views and borrowed some ideas from the experience of prerevolutionary Russia and Western European countries. A brief outline of these experiences given below may therefore help the Anglo-American lawyer to evaluate the soviet views.

II. The Soviet Doctrine of the Court Decision as a Source of Law

1. Preliminary: Effect of Decisions of Imperial Ruling Senate

The role of the decisions of the Ruling Senate, the Supreme Court of imperial Russia, was a controversial problem in Russian jurisprudence before the Revolution. The authority of such decisions evolved of necessity during the second half of the nineteenth century, owing to the inadequacy of statutory provisions governing private law. For example, the so-called Civil Laws (Volume X, Part One of the Code of Laws, *Svod Zakonov* of 1832) contained only twelve sections regulating contracts in general (Sections 1536–1540, 1545–1550), in contrast to the 387 sections devoted to this subject in the Saxon Code, 258 in the French, 79 in the Austrian, 280 in the Italian, and 228 in the Swiss. Such lacunae had to be filled by the courts. But prior to the judicial reform of 1864, the Russian statutes sought to limit the authority of a decision of the Supreme Court to the case in which it was rendered. Here the Russian legislation followed the pattern of many Western European codes of that time, inspired by the idea of the monopoly of the legislator in the creation of rules of law.[69]

[69] Preussisches Landrecht, Introduction, Article 6; French Law of April

Accordingly, the Russian statutes prior to 1864 expected the judge to apply the letter of the law strictly, and, should a difficulty arise in the application of the statute, the court was to suspend the decision, report the problem to the legislative authority—the Imperial Council—and await its instruction.[70] However, under the Codes of Civil and Criminal Procedures of 1864, the courts were prohibited to abstain from a decision under the pretext that the statutory provisions appeared incomplete, obscure, inadequate, or contradictory and were directed to base their decision in such cases on the ground of "the common sense of laws."[71] A judge acting contrary to this rule was liable to be prosecuted for denial of justice.[72] The Ruling Senate was made the court of last resort on errors in law, and, in granting the Ruling Senate the power to quash a decision of the lower court on an error in law and to remand the case for a new trial, the Code provided as follows:

> 813. The judicial bodies shall follow the opinion of the Senate explaining the precise meaning of the statute, and no appeal from the second decision [in the case] rendered on this ground shall be permitted.

Many Russian legal scholars, referring to some of the older provisions which remained on the statute books, insisted that this provision made the opinion of the Ruling Senate binding only upon the court to which the case was remanded for a new trial after the previous deci-

24, 1790. Title II, Article 12; Code Napoléon, Article 5; Austrian Civil Code, Section 12.

70 "Edict of December 13, 1768, Section 5," First Complete Collection of Laws, text 11, 989; "Statute on Provincial Government of November 7, 1775, Section 101," *id.*, text 17, 392; Code of Laws (Svod Zakonov) of 1832, Vol. I, Sections 68, 69. Vol. II, Section 260.

71 Code of Civil Procedure of 1864, Section 9.

72 *Id.*, Section 10.

sion in the case was set aside.[73] In later years, some other writers and the Senate itself referred to another provision of the Code of Civil Procedure which reads:

> 815. All decisions and orders of the Appellate Divisions of the Senate which clarify the precise meaning of the laws shall be publicized to the knowledge of all as a guide for the uniform interpretation and application of the laws.

On this ground, the Senate persistently held that its interpretation of the statute (ruling) was binding upon all courts in all cases of a nature similar to that of the case in which the ruling was issued.[74]

Thus, in fact, a decision of the Ruling Senate was given the full authority of a judicial precedent, in spite of the contrary opinion of certain professors of law. In case of discrepancy between decisions in various cases, the latest prevailed, provided the previous decision was expressly overruled.[75] The Senate also began to draw a distinction between *ratio decidendi* and *obiter dicta*.[76] Thus, the Ruling Senate supplied those general legal doctrines which were lacking, shaped legal institutions inadequately regulated by statute (e.g., the peasant household), corrected defective provisions, and made inapplicable those which were obsolete. As a result, the private law applied by the Russian courts on the eve of the Revolution was to a large extent judge-made law, a law of judicial precedent. Hence it may be argued that in this respect the imperial Russian private

[73] Shershenevich, 1 Textbook of Russian Civil Law (in Russian 1915) 76, 77.

[74] Ruling Senate, Civil Appellate Division, Decisions No. 1598 of 1870, Nos. 106 and 107 of 1889, No. 86 of 1893, No. 82 of 1909.

[75] Ruling Senate, Civil Appellate Division, Decisions No. 1628 of 1870, No. 143 of 1879, No. 122 of 1896, No. 85 of 1908, No. 122 of 1909, No. 99 of 1910, No. 106 of 1887, Nos. 5 and 13 of 1908.

[76] *Id.*, No. 59 of 1882, No. 75 of 1910.

law is comparable to the Anglo-American law, in spite of the civil law background.

On the eve of the Revolution, Russian theorists came to a realization of the fact that "judicial practice" had become an important source of private law in Russia. Thus, the only really systematic commentary on the Russian civil law, edited by Professor Worms, which began to appear in 1913,[77] gave for the first time an exposé of the Russian private law based upon a scholarly and accurate construction of the role of the decisions of the Ruling Senate in the creation of private law in Russia. Had there been more lively contact between Russian legal scholars and the Anglo-American common law, the imperial private law might have been shaped by the doctrines of the latter (e.g., *stare decisis*). But the Continental European doctrine based upon Roman law dominated the law schools of Russia. The system of codified statutes established on the Western European continent had an immanent appeal to theoretical Russian legal thought. Any departure from it was considered simply a feature of legal backwardness. This explains the opposition on the part of legal scholars to recognition of the authority of rulings of the Senate as a law-creating force. The above-mentioned commentary for the first time recognized that, by and large, the Senate accomplished satisfactorily the task of developing the concepts of private law in Russia and of filling the gaps in statutory provisions.[78]

In brief, the authority of court decisions gained recognition by necessity. The draft of the Civil Code brought

[77] Civil Laws (Volume X, Part One of Svod Zakonov) A Practical and Theoretical Commentary (in Russian 1913–1914) 3 vols., the last section commented upon being 1373.

[78] *Id.* 29.

before the legislature in 1913 attempted to express such recognition of the authority of court decisions in a moderate formula assigning them the role of "guide" in cases where the statutes lacked clarity. It tacitly passed over the problem whether such guide was to be binding upon the courts or was merely a moral authority. The draft stated:

> 19. Interpretations contained in the decisions and orders of the Supreme Court (the Ruling Senate) as well as principles established in the judicial practice of other courts of the empire shall be taken as a guide for the uniform interpretation and application of civil laws in cases where such laws lack clarity.[79]

The soviet legal writers tend recently to find in this clause a pattern for formulating the role of court decision in soviet law.[80] The decisions of the soviet Supreme Court—specifically, the decisions passed in a Plenary Session in which all the justices participate—are regarded as a means to achieve uniform application of statutes by the soviet courts.

2. Plenary Sessions of the Soviet Supreme Court

The emphasis placed upon this particular kind of decision (Section 75 of the soviet Judiciary Act of 1938) is also inspired by a similar provision of law of imperial Russia and some Western European countries. In contrast to the United States Supreme Court, the supreme courts of Europe consist of a large number of justices and are subdivided into divisions which correspond to the nature of various cases, such as the civil and criminal divisions. The divisions in turn are subdivided into benches of from five to seven justices before

[79] 1 The Civil Code, Draft, edited by Saatchian (in Russian 1910) 13.
[80] See *infra*, note 98.

which individual cases is heard. Thus, the legal problem which arises in several cases may be brought to and decided by different benches of the Supreme Court. Decisions of Plenary Sessions evolved out of the necessity to achieve uniformity in the solution of the same problems by various benches of the Supreme Court. Austria and imperial Russia, both countries whose statutes limited the application of a court decision to the case in which it was rendered, enacted, the former in 1850 [81] and the latter in 1877,[82] laws authorizing the Attorney General to bring before a Plenary Session of all the justices, problems requiring uniform solution and to obtain from them a decision detached from any particular case, i.e., an authoritative interpretation of a given statutory provision. The decision thus rendered was then binding on all the divisions of the Supreme Court. Somewhat similar provisions were also enacted in Germany in 1877.[83] This pattern was followed in certain other countries, especially after World War I.[84]

The U.S.S.R. Supreme Court consists also of a large number of justices (46 justices and 25 assessors in 1946), and ordinarily cases are decided by a bench of the particular division consisting of three judges (three justices or one justice and two assessors). There is also a Plenary Session superintending the administration of justice by the benches and exercising especially broad powers, which are discussed *infra*.

Under the Judiciary Acts of 1923 and 1926, there was a presidium established in the Supreme Court and also in each regional court, consisting of the president of the

[81] Imperial Patent of August 7, 1850, Reichsgesetzblatt 325, Sections 16, 36; Law of January 25, 1919, Staatsgesetzblatt 41.
[82] Section 259 [1] of the Judiciary Act as enacted in 1877.
[83] German Judiciary Act of January 27, 1877, Sections 136, 137.
[84] E.g., Poland.

court, his deputies, and presidents of the divisions. The presidium deliberated in advance on matters which were to go to the Plenary Session, decided questions relating to judicial administration and personnel, and functioned also as a kind of appellate court for cases decided by individual benches of the court. The Judiciary Act of 1938 abolished the presidia. Their administrative functions have since been exercised by the president of the court singly, by the Minister of Justice, and by his regional officers.

3. The Role of Court Decisions in Soviet Law

The significance of a court decision as a judicial precedent is extremely dubious under soviet law. Constitutional and statutory provisions as well as the discussions of soviet jurists are in many respects discordant with actual practice. On one point there is no room for doubt, however: the decisions of courts below the supreme courts of the constituent republics do not serve as precedents. The earlier soviet writers were distinctly afraid that the doctrine of precedent might be an obstacle to that flexibility of policy which is required in the soviet judiciary. Thus, Stuchka believed:

> Judicial precedent loses its significance, being driven out by written law. The penetration of revolutionary dialectics into the consciousness of judges is important above all in order that their practice . . . may not become ossified through blind adherence to the letter of precedent.[85]

When all the imperial courts were abolished in 1918, no single supreme court was definitely established in Soviet Russia until 1923.[86] Then, the Code of Civil Pro-

[85] Stuchka, 1 Course 189.

[86] Prior to the establishment of the R.S.F.S.R. Supreme Court, criminal cases were subject to revision by the Supreme Tribunal and civil cases by

cedure enacted a provision, which is essentially still in force, declaring the ruling of the superior court binding upon the lower court to which the case was remanded for a new trial.[87] The R.S.F.S.R. Supreme Court explained in a Circular Letter of September 16, 1923:

> Decisions of the Appellate Division of the Supreme Court which are systematically published are binding only in cases to which they relate and in no way have the force of law or of a binding interpretation of law, but have the significance of exemplary decisions for the respective category of cases.[88]

On the other hand, in his capacity as the President of the R.S.F.S.R. Supreme Court, Stuchka did a great deal to raise the prestige of this court and to establish some kind of reporting system for its decisions. Until 1935, the U.S.S.R. Supreme Court played an insignificant role in the development of the soviet law. It was no more than an advisory institution to the central Executive Committee, the supreme governing body under the 1923 federal Constitution, and had no authority to reverse any decision of a lower court.[89] This power was

the Division of Judicial Control of the Commissariat for Justice, *cf.*, R.S.F.S.R. Laws 1920, text 465.

87 R.S.F.S.R. Code of Civil Procedure, Section 248.

88 R.S.F.S.R. Supreme Court, Circular Letter No. 59 of September 16, 1923 (1923) Soviet Justice No. 36; 1 Sources of Soviet Civil Law (in Russian 1938) 8.

89 U.S.S.R. Constitution of 1923, Section 43:

> The said court shall have the power and jurisdiction: (a) to give the supreme courts of the constituent republics authoritative interpretations of questions relating to federal legislation; (b) to review on the motion of the federal Attorney General any decree, order, or judgment of the supreme courts of the constituent republics that may be in contravention of federal legislation or that may affect the interests of other republics, and to submit any such decree, order, or judgment to the Central Executive Committee of the Union; (c) to render opinion on constitutionality of any decision of a constituent republic if requested to do so by the federal Central Executive Committee: (d) to adjudicate legal disputes between constituent republics.

In 1935, subsection (b) was changed to read as follows:

> (b) to deliberate and to repeal the decrees, orders, and judgments of the supreme courts of the republics that may be in contravention of the federal

granted only to the supreme courts of the constituent republics, and such courts of the R.S.F.S.R. and the Ukraine for a time used to issue annual surveys of cases decided and general letters of instruction to the courts in regard to the application of the soviet statutes. Many of their decisions were printed in special periodicals or the official organs of the Commissariat for Justice. Several systematic collections of R.S.F.S.R. Supreme Court "rulings in force" had appeared by 1935.[90] This court in particular undoubtedly contributed to the development of the soviet private law. The soviet textbook of 1936 remarks:

> In contrast to capitalist law, we do not admit so-called judicial precedent as a source of law. However, the law-creating role of courts and arbitrators settling disputes between governmental enterprises is beyond doubt. Courts and arbitrators issue interpretations, circular letters, instructions, etc., on questions of high importance. These materials are also sources of soviet civil law and play an important role in practice.[91]

The 1936 federal Constitution and the Judiciary Act of 1938 created great uncertainty. Section 49, subsection (b), of the Constitution states that the Presidium of the Supreme Soviet "shall interpret the laws." The Judiciary Act of 1938 does not provide for any grant of power to the supreme courts of the constituent republics to issue rulings of a general nature. But it expressly provides in Section 75 for Plenary Sessions of the U.S.S.R. Supreme Court, which "shall give directive instructions in matters of judicial practice on the basis of decisions rendered in judicial causes tried by

legislation or that may interfere with the interests of other republics. U.S.S.R. Laws 1935, text 68, Section 1.

[90] Collection of the Rulings in Force of the R.S.F.S.R. Supreme Court (in Russian 1st ed. 1930, 2d ed. 1931, 3d ed. 1932, 4th ed. 1935). The first and second editions were edited by Stuchka.

[91] Rubinstein 34.

the U.S.S.R. Supreme Court." The power of the Presidium to interpret laws is practically never used. It legislates instead, changing frequently even the Constitution.[92] The U.S.S.R. Supreme Court has since 1938 issued several comprehensive rulings, independent of any specific cases and covering a single wide field of law, e.g., one in 1940 on tenancy, and one in 1943 on torts which actually exceeds in importance the meager provisions of the Civil Code dealing with torts.[93] A textbook of 1938 on civil procedure describes the situation in an evasive way:

> Court decisions as a source of civil procedure deserve special attention. According to subsection (b) of Section 49 of the 1936 federal Constitution, only the Presidium of the Supreme Soviet has the right to interpret the laws of the U.S.S.R. However, an interpretation given by the Supreme Court respecting the application of law in a given case is mandatory upon the court trying the case. By virtue of the moral authority enjoyed by the supreme judicial bodies of the U.S.S.R. and the constituent republics, rulings contained in their decisions and orders serve as a source of cognizance of law, for its application in concrete cases.[94]

The text, then, merely quotes the stated provisions of Section 75 of the Judiciary Act without any attempt to explain the importance of the general rulings of the U.S.S.R. Supreme Court. No less evasive is the textbook of 1938 on civil law:

[92] See *supra*, Chapter 2, V, 2.

[93] See Chapters 14 and 15 on Torts and Volume II, No. 2, comments to Sections 403 *et seq.*

[94] Civil Procedure, Textbook for the Law Institutes (in Russian 1938) 22. Kleinman, editor, Civil Procedure (in Russian 1940) 15, comments briefly:

> Directive rulings issued by the Plenary Session of the U.S.S.R. Supreme Court on questions of judicial practice and given on the basis of cases tried by the Supreme Court have also the significance of a source of soviet civil procedural law.

Abramov, Civil Procedure (in Russian 1946) 10, is essentially of the same opinion. He emphasizes in addition, that the rulings of plenary sessions of the supreme courts of the constituent republics, issued before 1938 are also sources of law unless overruled.

. . . (b) An interpretation of a law issued by the Presidium of the Supreme Soviet of the Union . . . (as well as of a constituent or autonomous republic) shall have the force of an edict (*ukaz*) and, consequently, shall be equally mandatory upon everyone and everybody. . . . (c) Judicial interpretation. Unlike an interpretation issued by the Supreme Soviet or its Presidium, an interpretation issued by an authority which applies law to concrete legal relations (courts, arbitrators, et cetera) shall be mandatory only in the case in which the interpretation was given. According to Section 75 of the Judiciary Act, the Plenary Session of the U.S.S.R. Supreme Court issues directive instructions on questions of administration of justice on the ground of decisions rendered by this court in cases tried by it. In this way, the judicature works out a uniform understanding and application of laws to similar legal relations. However, when a court renders the decision in a given case, it does not bind itself for the future by this decision. The legislation in force at the time a case is decided, and not the preceding decisions of the court in similar cases, shall be the source of law for all subsequent court decisions.[95]

An attempt to clarify the situation was made by Orlovsky, a soviet professor, in a monograph which appeared in 1940. He put forward a theory which, on the one hand, appears to be inspired by the point of view stated in the imperial Russian draft of a Civil Code of 1913[96] and, on the other hand, reminds one of the French doctrine of *jurisprudence constante*.[97] This the-

[95] 1 Civil Law Textbook (1938) 52.

[96] See *supra* II, 1, at note 79.

[97] The essence of this French doctrine of *jurisprudence constante* is explained by a keen British student of French law as follows:

"There is no fundamental axiom of French law that a judicial determination of an issue of law, even by the highest court in the land, has declarative authority in any other case or proceeding. Nevertheless any reported decision (unless it has been completely discredited) has some measure of persuasive weight; and this persuasive weight steadily increases as the courts progressively settle down to a uniform and consistent attitude on any particular point; so that an undeviating practice, a *jurisprudence constante* adopted by the *Cour de Cassation* has an authority barely distinguishable, when judged from a practical standpoint, from a settled line of decisions in our own courts. No single decision makes law; but it is reasonable to say that an established course of decision indicates and expresses a judicial practice or custom which is indistinguishable from law." Sir Maurice Sheldon

ory seems to denote the actual role of court decisions in soviet law better than the above quotations. According to Orlovsky, individual court decisions, even of high courts, are not sources of soviet law. Only principles continuously applied by the courts or announced in the instructive rulings passed by Plenary Sessions of the U.S.S.R. Supreme Court (see *supra*) after 1938, or by similar sessions prior to that date of the supreme courts of soviet republics, notably the R.S.F.S.R. and the Ukraine, in his estimation may be regarded as sources of law. His salient statements are as follows:

> The dictatorship of the proletariat has been and is the source of soviet private law . . . The socialist statute is the only basic legal source of soviet private law . . . A soviet court, in deciding a concrete case, does not create any new rule of law, and in particular of private law, but merely applies the statute in a given instance . . . A judicial cause, if correctly decided, may serve as an example for the determination of other similar cases. A ruling of the superior court issued in an individual case may become a guide for other courts only if such ruling obtains the approval of the Plenary Session of the U.S.S.R. Supreme Court. Judicial decisions rendered in separate cases, taken individually, do not yet constitute judicial practice and are not therefore a source of law. We call "judicial practice" not separate judicial decisions or court orders, even those rendered by the supreme tribunal of our country—the U.S.S.R. Supreme Court—but the conclusions and generalizations derived by the Plenary Sessions of the U.S.S.R. Supreme Court from a series of kindred decisions applied by our courts in the course of a more or less extended period of time in similar cases. In this capacity, our judicial practice acquires the character of directives binding upon the courts and consequently is a source of soviet private law. Directive instructions of the Plenary Sessions of the U.S.S.R. Supreme Court which when passed did not as yet receive any extensive application in judicial decisions, are sources of soviet private law, even where stated for the first time by a Plenary Session

Amos and Frederick Parker Walton, Introduction to French Law (Oxford 1935) 7.

of the U.S.S.R. Supreme Court: they are not statutes, but they serve as directives binding upon all courts of the Union in matters of administration of justice.[98]

Essentially this point of view is shared by the textbook of 1944, as follows:

> Judicial practice in civil cases is of utmost importance for application and interpretation of the soviet private law and for resolving concrete relations based on private law, and yet it does not constitute a source of the soviet private law. A court decision has binding force only in the case in which it is rendered, and, therefore, the so-called "judicial precedent" should not be considered with us to be a source of law. . . . Established judicial practice, formed as a result of numerous kindred court decisions, rendered in the course of a considerable length of time, likewise does not constitute a source of the soviet private law. Under soviet conditions, the basic task of the court is to fortify legality, and to apply the soviet statute consistently and correctly from the class point of view. Granting a soviet judge a law-creative role would essentially grant him a legislative function and weaken the authority of the soviet statute. . . .
>
> Judicial precedents and established judicial practice, although not a source of law, are of great importance for the elucidation of the contents of law and its application. Uniformity of judicial practice makes stronger the force of the soviet statute; socialist legality requires a uniform application of the soviet laws. . . .
>
> The resolutions of the Plenary Session of the Supreme Court are general in nature, not being decisions in a given case. They are binding on the courts in deciding the cases concerned. Therefore, the powers given to the Plenary Session of the U.S.S.R. Supreme Court give reason to consider its directive rulings to be a source of law.[99]

[98] Orlovsky, "The Significance of Judicial Practice in the Development of Soviet Private Law" (in Russian 1940) Soviet State No. 8/9, 95, 96. The author refers, among other things, to the Rulings of the R.S.F.S.R. Court of June 29, 1925, exempting the government from the statute of limitations, and of June 28, 1926, concerning mixed liability, as having attained general recognition. See Volume II, comment to Section 26, and Chapters 14 and 15 on Torts.

[99] 1 Civil Law (1944) 36, 37.

In the presentation of material in this study, due account has been taken of the role of court decisions in the formation of the soviet law. In many instances, court decisions have been digested primarily to illustrate the application of soviet provisions. The resolutions of the Plenary Sessions of the Supreme Courts and their instructive letters and annual reports stating general guiding principles are quoted more extensively and occasionally without reference to a particular set of facts, whenever the principles are couched in broad and abstract terms. Judicial decisions of that type constitute what we may call judicial interpretation of the statutes, comparable to judicial precedent in the common law.

The comparison should not, however, be carried too far. The authority of a court decision depends to a large extent upon the status of the court within the framework of the government mechanism. It depends also upon the judicial personnel. It is significant that, of about one hundred members of the U.S.S.R. Supreme Court in 1946, there is not one lawyer of prominence. The specific modest and subordinate position of the soviet court within the soviet machinery, which is outlined above, is the real reason why the theoretic discussion by the soviet jurists of the role of court decisions in soviet law fails to clarify the situation. The soviet legal theorists resort, as is shown above, to doctrines developed in imperial Russia and Western Europe, where the courts have a higher position than that which courts enjoy in the Soviet Union. To accept such doctrines totally would mean to grant the soviet courts more authority than is compatible with the general concept of "the dictatorship of the proletariat" as the source of law. The dictatorship of the proletariat is no more logically reconcilable with a free and independent court as

a law-creative force than any other dictatorship. The decision in a case is in the last analysis controlled by the policy of those official and semi-official agencies which exercise the dictatorship and not by precedents. Soviet cases offer rather examples of how problems have been decided in the past than reason for predicting a future decision. Any change in the policy of the government may interrupt the chain of precedent.

PART TWO

SPECIAL TOPICS

BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DATE

Chapter 8

Discontinuity of Prerevolutionary Law and Vested Rights

I. Statutory Provisions

The soviet law has generally repudiated the continuity of law and the rights that were effective prior to the November, 1917, Revolution. The protection of private rights announced in Section 1 of the Civil Code and discussed in the next chapter extends only to rights newly acquired after a certain date under the soviet regime. This principle is expressed in the following provisions:

Discontinuity of Law

Code of Civil Procedure

3. The court shall decide cases in conformity with the legislative enactments and decrees of the workers' and peasants' government that are in force, as well as with ordinances of the local authorities issued within their jurisdiction.

Law Enacting the Civil Code

6. It is forbidden to interpret provisions of this code on the ground of laws of overthrown governments and the decisions of prerevolutionary courts.

Discontinuity of Rights

Law Enacting the Civil Code

2. No court or other authority of the republic shall take

cognizance of disputes over private rights arising out of relations that originated before November 7, 1917.

3. Disputes over private rights arising from relations which originated within the period from November 7, 1917, to the effective date of the R.S.F.S.R. Civil Code, shall be decided under the laws in force at the time when the relations originated.

II. Rejection of Prerevolutionary Law

1. Comparison with Other Countries

Section 6 of the Enacting Law states the renunciation of all prerevolutionary Russian laws as a matter of basic principle. In this respect, the soviet law is at variance with the attitude taken by other governments which came into being as a result of revolutionary changes, whether by internal revolution or the creation of a new country.

In most cases, such governments have retained the old laws as a whole and changed only those not in accord with the new order. This has been especially true of the private law which, once established, has a tendency to survive all changes of political regime and alterations of the territorial boundaries wherein it was originally received.

Thus, the Code Napoléon, introduced in 1806 in the Grand Duchy of Warsaw, survived the Grand Duchy, its incorporation into Russia as the Kingdom of Poland, the transformation of this kingdom into mere Vistula provinces of Russia, and the resurrection of Poland in 1918. Even the elaborate codification of independent Poland has not affected the provisions of the Code Napoléon in the parts relating to property, provisions undisturbed by the German occupation. The Austrian Civil Code has remained in force in Czechoslovakia, in some parts of Yugoslavia, and in Poland, and still sur-

vived under German occupation. The imperial Russian Civil Laws have remained in force in parts of Poland, in Lithuania, and, up to 1927, in Latvia.

The principle of continuity of prior laws was invariably followed by the new countries which came into existence after World War I as a result of the dismemberment of Austria and Russia.

Poland, Czechoslovakia, Yugoslavia, Lithuania, Latvia, and Estonia accepted the presoviet Russian, German, Austrian, and other laws previously in effect in a given part of their territory and applied them until new laws took their place. Whether expressed in a statute, as was the case in Czechoslovakia,[1] or not, this principle was followed. The old laws were continued with the exception of those obviously incompatible with the new regime, e.g., laws closely connected with a monarchical form of government in a country which had become a republic.

Leaving aside the intricacies of the transplantation of English law to the American colonies, the attitude of these countries is comparable to the general attitude of the majority of our states toward the common law.[2] "The common law," says William Walsh, "as a general system of legal principles was adopted by the states after the Revolution, and in most of the new states thereafter. . . . In several states the constitution or statutes provided that the English common law of a general nature, down to the time of the Revolution, or

[1] Sbírka Zakonu a narizení (1918) cislo 11.

[2] Morris, Studies in the History of American Law (1930) 13 *passim;* Auman, The Changing American Legal System: Some Selected Phases (1940) *passim;* Pope, "The English Common Law in the United States" (1910–1911) 24 Harv. L. Rev. 6; Goebel, J., Jr., "King's Law and Local Custom in the Seventeenth Century in England" (1931) 31 Col. L. Rev. 418, especially 429 *et seq.;* a review of it by Llewellyn, *id.* 729.

the date of the independence, are in force."[3] This, of course, was true with the reservation that the English common law was received "so far as it is applicable to our situation and government," according to Kent,[4] or, as Judge Story remarked in a leading case, that the ancestors of modern Americans "adopted only that portion which was applicable to their condition."[5]

The attitude of the soviets toward the Russian legal inheritance is basically different, being comparable to the attitude toward the laws of England taken by the General Court of Massachusetts in 1646 or that of the General Court of Connecticut in 1665 (*Book of Laws*), as reported by Robert Quary.[6]

However, while some of the colonial courts began with a renunciation of English law, the doctrine eventually accepted in the United States, subject to the reservation

[3] Walsh, William, A History of Anglo-American Law (2d ed. 1932) 94.
[4] Commentaries I, 472, quoted from Walsh, *op. cit.* 93.
[5] Van Ness v. Pacard, 2 Pet. (27 U. S. 1829) 137, 144, 7 L. ed. 374, quoted from Walsh, *loc. cit.*
[6] Morris, *op. cit.*; see *supra*, note 2 at 18, 19:

In reply to the remonstrants in 1646 the General Court courageously declared:

"Our allegiance binds us not to the laws of England any longer than while we live in England, for the laws of the parliament of England reach no further, nor do the King's writs under the great seal go any further. . . . And whereas they seem to admit of laws not repugnant, etc., if by repugnant they mean, as the word truly imports, and as by the charter must needs be intended, they have no cause to complain, for we have no laws . . . contrary to the law of God and of right reason, which the learned in those laws have anciently and still do hold forth as the fundamental basis of their laws, and that, if anything hath been otherwise established, it was an error, and not a law, being against the intent of the lawmakers, however it may bear the form of a law (in regard of the stamp of authority set upon it) until it be revoked. . . ."

In 1665 the General Court of Connecticut decided that the colony should resort to the word of God in the absence of specific law. Robert Quary commented on this statement in the *Book of Laws* as follows:

"The people are of a very turbulent, factious and uneasy temper. I cannot give their character better than by telling your Lordships that they have made a body of laws for their government which are printed; the first of which is that no law of England shall be in force in their government till made so by act of their own. Having told your Lordships this, I think there is no further room to admire at any extravagancy acted in the government."

above stated, developed the other way. In contrast, while early soviet enactments bear traces of an attitude toward the prerevolutionary law comparable to the final American doctrine respecting the English common law, the latest exhibit the radical rupture expressly stated in Section 6 of the Enacting Law.

2. Background of the Principle of Discontinuity

In the early days of the soviet regime, all the pre-soviet administrative authorities, the agencies of the central government as well as the democratically elected organs of municipal and other local self-governments (*Zemstvo*), were dissolved. The local soviets took their place.[7] Decree No. 1 on the Judiciary of December 7, 1917 (November 24, old style calendar), dissolved all the hitherto existing judicial institutions *en bloc*, but nevertheless the old laws at first retained their effect to some extent. The newly created people's courts were instructed to apply "the laws of the overthrown governments only insofar as they were not abrogated by the Revolution and did not contradict the revolutionary conscience and revolutionary concept of law."[8] However, the compilers of the decree were aware of the fact that no definite concept of law would be in the minds of coming soviet judges,[9] so a note was added to this section explaining that those old laws "are considered abrogated," which contradicted the decrees of the central organs of soviet power (the Central Executive Committee of the Congress of Soviets and the Council of People's Commissars) and the "program-minimum of

[7] R.S.F.S.R. Laws 1917–18, texts 5, 180.
[8] R.S.F.S.R. Laws 1917–18, text 50, Section 5, quoted in Chapter 5, p. 156.
[9] See Chapter 5, p. 156.

the Russian Social-Democratic Party and the Party of Socialist Revolutionaries." [10]

For obvious reasons, the next decree on the judiciary, passed in February, 1918,[11] omitted the reference to the "program-minimum." This program contained a declaration of principles of advanced democracy, some of which, such as universal suffrage and secret ballot, were denied at that time by the soviets. The same decree substituted the words "socialist concept of law" and "concept of law of the working masses" for the "revolutionary concept of law." For purposes of procedure, reference was made to the imperial judicial statutes of 1864, and the courts were required to state the reason for which "the court abrogated one or another law as obsolete or capitalist." However, the instruction of the Commissar for Justice again referred to "the revolutionary concept of law" as an obvious synonym for the "socialist concept." [12]

Finally, the Statute on the People's Courts of the R.S.F.S.R. of November 30, 1918, definitely prohibited any citation of prerevolutionary law in a court decision.[13] Section 22 of the statute reads:

> 22. When rendering a decision in a case, the People's Court shall apply the decrees of the workers' and peasants' government and in absence of an appropriate decree or if a decree is incomplete, the court shall be guided by the Socialist concept of law.
>
> Note: Any citation of the laws of the overthrown governments in a court decision or sentence is prohibited.

Thus the soviet legislation arrived at a complete break

[10] R.S.F.S.R. Laws 1917–18, text 50, Section 5 Note, quoted in Chapter 5, p. 156.
[11] Decree No. 2 on the Judiciary, R.S.F.S.R. Laws 1917–18, text 347 (erroneously marked 420), Sections 8, 36.
[12] R.S.F.S.R. Laws 1917–18, text 597, Section 35.
[13] *Id.*, text 889, Section 22.

of continuity with the imperial laws and those of the Provisional Government. These laws formally ceased to be a guide for the soviet courts. This principle was restated in a more developed form in Section 6 of the Law Enacting the Civil Code and in Section 3 of the Code of Civil Procedure (see *supra*).

Section 6 prohibits not only the citation but also any use of the old laws in the interpretation of the soviet Civil Code. It seems to be a generally accepted point of view that this prohibition applies not only to the Civil Code but also to any enactment dealing with private law.[14] "By prerevolutionary courts," comments Malitsky, "not only the courts of the czarist regime, but also the courts of any governments other than soviet, including the courts of foreign capitalist countries, are intended." [15]

3. Application of the Principle of Discontinuity

Repudiation of the continuity of prior laws remains the fundamental principle of soviet jurisprudence, and yet it was never carried out with such rigor as it was proclaimed. The new legislation could not fill at once the "juridical vacuum" created by lump abrogation of old laws. Nor could the Civil Code and subsequent legislation at once fill all the gaps. It was more than natural that various earlier laws of a technical nature, such as those relating to postal and telegraph services and to railroad transportation, should continue to be applied. For instance, the first soviet statute on the railroads was enacted only in July, 1920. Neither the Civil Code of 1922 nor the antecedent legislation regulated negotiable instruments, agency, bailment, or gratuitous loan for

[14] Civil Law Textbook (1938) 52.
[15] Malitsky 23.

use. The first soviet decree on negotiable instruments was not enacted until March 20, 1922,[16] while instruments were issued prior to this date by the nationalized industrial units and disputes were settled under the old rules. Mercantile agency was not regulated by soviet law until 1926,[17] but mercantile agency contracts appeared prior to that and "were constructed after the pattern of the prerevolutionary agency contracts."[18] In the treatment of contracts which are not regulated by such legislation, the old Russian legal concepts are noticeable. Moreover, a number of soviet laws contain provisions practically copied from the prerevolutionary statutes or derived from prerevolutionary court reports. For example, the Land Code of 1922 gave to the peasant household and the land tenure of peasant communities (*mir*) a construction derived from decisions of the Supreme Court of imperial Russia, interpreting the imperial General Statute on Peasants.[19] Thus, the old laws, though not cited, have survived their formal abrogation and continue to be applied. "We only imagined," says Stuchka, Commissar for Justice and Chief Justice of the R.S.F.S.R. Supreme Court, "that we abolished the law. . . . The old law was quite persistent in the form of customary law. . . . The workers from the factories, when they were appointed as judges and came in contact with civil cases, and therefore with private law, became jurists; 'juridical logic' overtakes them."[20]

[16] R.S.F.S.R. Laws 1922, text 285.

[17] Ukrainian Law of December 16, 1925; R.S.F.S.R. Law of September 6, 1926, R.S.F.S.R. Laws 1926, text 451.

[18] Koblenz, "Agency Contract According to the Civil Code" (in Russian 1926) Soviet Justice 1401.

[19] See Chapters 18 and 19, also Chapter 13, I, Sale.

[20] Stuchka, 1 Course 10; *id.* (2d ed.) 175–176, 188; *id.*, Class State and Civil Law (in Russian 1923) 9.

It is beyond doubt, however, that the soviet legislators aimed at a radical rupture with the old legal order as a whole and that they succeeded in time by issuing their own laws. The imperial laws and those of the Provisional Government are no longer an official source of law in Soviet Russia, though some of the soviet laws reproduce their provisions.

4. Recent Change of Attitude Toward Old Legal Works

The history of Russian law was not even taught until recently in the soviet law schools, but its teaching has been resumed (in 1937), and a sizeable textbook entitled *The History of the Law and of the State of the U.S.S.R.*, by Professor Yooshkov (Iushkov), appeared in 1939.[21] A discussion of this work in a soviet law review indicates that the history of Russian law there given has been taken in many instances almost word for word from a prerevolutionary textbook.[22] In the textbook of 1935 on civil law, the imperial Russian legal literature is discussed, in passing, in the chapter devoted to the capitalist doctrine of private law.[23] The recent textbook of 1938 gives a separate, though brief, survey of the sources of prerevolutionary civil law and of the outstanding writings on this subject.[24] Recent monographic studies on individual problems of soviet private law do not ignore prerevolutionary legal writing and pay full attention to the views of prerevolutionary scholars, even

[21] Iushkov, History of Law and State of the U.S.S.R., Part 1 (in Russian 1940) 595. For a discussion of the change of the soviet attitude towards Russian history, see Chapter 4, II.

[22] Viz., from Latkin, Textbook of the History of Russian Law of the Period of the Empire (in Russian 1909). See Pokrovsky's review of Iushkov's book, (1940) Soviet State No. 12, 119; *id.* 1941, No. 2, 146 *et seq.*, 156 *et seq.*

[23] Gintsburg, 1 Course 67.

[24] 2 Civil Law Textbook (1938) 483.

when they are not accepted.[25] Soviet writers do occasionally borrow ideas from them, refraining from reference.[26] The textbook on civil law of 1944 gives in each chapter a fairly comprehensive bibliography of works on the subject matter of the chapter published by the Russian prerevolutionary, Western European, English, and occasionally American writers.[27] The soviet works of the earlier period are not mentioned, e.g., the two-volume course on economic law of 1933–1935.

III. Discontinuity of Vested Private Rights

1. General Principle and Exceptions

Repudiation of the continuity of private rights, which originated before the Revolution, is implied in the clause of Section 2 of the Enacting Law (see *supra,* p. 273), which prohibits the courts and other authorities from taking cognizance of disputes over such rights. Thereby these rights were not repealed but deprived of legal protection. Only rights acquired under the new regime are granted protection by law. In many instances a *de facto* seizure, if it had been accomplished, was declared equivalent to title. Such specific instances are discussed *infra* and in Chapter 19. Here it suffices to state that in addition to the general proscription of all prerevolutionary private rights stated in Section 2 of the Enacting

[25] E.g., Pokrovsky, *op. cit.*, note 22 at 110; Orlovsky, "The Role of Judicial Practice in the Development of the Soviet Private Law" (in Russian 1940) Soviet State No. 8/9, 91; Zimeleva, "Joint Ownership" (in Russian 1941) 2 Transactions of the All-Union Law Institute 13.

[26] For an example, see Chapter 14, pp. 495, 501 and Chapter 6, p. 206 *et seq.*

[27] Agarkov, Bratus, Genkin, Serebrovsky, and Shkundin, Civil Law, 2 vols. edited by Agarkov and Genkin (in Russian 1944) and published by the All-Union Institute of Legal Sciences attached to the U.S.S.R. Commissariat for Justice and the Law Institute of the U.S.S.R. Academy of Science, cited as Civil Law (1944). See, for instance, Volume 1, pages 26, 45, 77, 89, 116, 139, 200, 218, 251, 296, 351, 386.

Law, cancellation of anterior property rights is specifically stressed in Notes 1 and 2 to Section 59 of the Civil Code. Note 1 bars the former owners from recovery of their property which "has been expropriated or otherwise passed into the possession of the toilers prior to May 22, 1922." [28] Note 2 repeals the Decree of March 16, 1922, which permitted the recovery of household goods by certain owners from the actual holders.

Although the cancellation of all former rights is clearly stated and was seriously intended, its consistent application has presented difficulties. Wholesale disregard of all old rights occasionally affected the interests of certain classes of individuals whom the soviet law intended to protect. As Zavadsky, a Russian jurist in exile, questioned, should not the soviet courts recognize the claim of a worker for compensation for an accident which occurred before November, 1917, in a factory which later became nationalized? [29]

Such cases soon came before the soviet courts. The Civil Division of the R.S.F.S.R. Supreme Court stated:

> Our Civil Code does not establish any continuity between the economic and legal relations that existed before the November Revolution, and those created by the Revolution. However, should this line of policy be strictly followed, it would run contrary to another fundamental principle. Life and experience have shown that, to the extremely important general principle stated above, an exception of no less political importance must be made. It has been impossible to apply the categorical requirement of Section 2 of the Enacting Law to cases of compensation for injuries of workers which occurred before the Revolution. Therefore, the courts must take cognizance of cases arising from the legal relations of parties that originated

[28] The date of promulgation of the decree on recognition of private rights, the precursor of the Civil Code. See comment to next chapter.

[29] Zavadsky, "Civil Law" 2 The Law of Soviet Russia (in Russian, Praha 1925) 3 *passim*.

before November 7, 1917, if the plaintiff is a toiler who suffered injury in private employment.[30]

On the other hand, the Plenary Session of the R.S.F.S.R. Supreme Court emphasized that the claims of injured persons must be satisfied "in exceptional cases . . . viz., if the injured person does not receive any pension and if a crippled toiler has no earned income and there is no person obliged to provide him with maintenance."[31] It was also held that this rule is applicable against enterprises taken over by the government and that the former employer may be sued if he did not become a toiler under the new regime.[32]

The Ukrainian Supreme Court rendered a similar decision with regard to railroad accidents.[33] A similar exception was suggested for orphans. In one case the right of plaintiffs, who were orphans, to one-third of a house was recognized on the ground that, though the house was purchased in 1916 in the name of the defendant, it was paid for with the joint money of the defendant and the father of the plaintiffs (now orphans).[34]

The following ruling by the R.S.F.S.R. Supreme Court, though not very lucid, suggests a further exception. It deals with legal relations which, although originating before the Revolution, continued thereafter, e.g., a lease. The court said:

> The soviet courts may try cases arising from private legal

[30] "Report on the Activities of the Civil Appellate Division of the R.S.F.S.R. Supreme Court for the Year 1925" (1927) Soviet Justice 109; Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 1932) 30–31; Nakhimson, Commentary 2–3.

[31] "R.S.F.S.R. Supreme Court Protocol No. 70 of April 2, 1928" (1928) Soviet Justice 640; Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 1932) 31, paragraph 2(b). See also "Decision of the Plenary Session" (1925) Soviet Justice No. 28; Nakhimson, Commentary 3, 696.

[32] *Ibid.*

[33] Malitsky 19–20.

[34] *Loc. cit. supra* note 31.

relations which, although legally originating before November 7, 1917, nevertheless in fact continue to exist between the parties after November 7, 1917, provided these factual relations are not prohibited by and do not conflict with the soviet law. In such cases, the courts shall not take into consideration documents relating to the period of time prior to November 7, 1917, nor evidence and legal arguments and defenses derived from relations as they were before November 7, 1917. The court must apply, in such cases arising from the above-mentioned subsisting factual relations, the soviet laws in force at the time of trial, supplementing them if necessary, according to Section 4 of the Law Enacting the Civil Code.[35]

Against these admitted exceptions, there is an additional curtailment of disputes involving prerevolutionary rights. For these cases, Section 7 of the Civil Code established the very short three-year general period of limitation.

It may be noted that in countries which after World War II have enacted legislation of the soviet type, such as Yugoslavia and Poland, the principle of total discontinuity of the old law and rights has not been declared thus far.

2. Nonretroactivity of Recognition of Rights by the Soviet Code

The soviet Civil Code carried with it protection of many rights, of property rights in particular, which were denied during the previous period. Section 3 stated the general principle of nonretroactivity of such recognitions. Rights which originated between November 7, 1917, and the effective date of the Code are to be adjudicated under the laws in force at the time when the right originated. Thus, a right suppressed by the soviet laws was not resurrected even if the Code recognized

[35] Malitsky 18.

such right. Recent court decisions departed from a strict application of this principle as regards succession rights. Inheritance, the abolition of which was declared by the Decree of April 27, 1918, was admitted to the amount of 10,000 rubles by the Civil Code. Freund, a German scholar, who published many works on soviet law, commented in 1924 that, if the *de cuius* died in 1921 his heirs could not claim the estate under the provisions of the Civil Code.[36]

The Third Division of the R.S.F.S.R. Commissariat for Justice expressed the same opinion in the Ruling of August 7, 1923:

> Succession rights were introduced only on January 1, 1923 . . . Therefore, with regard to property of persons deceased before January 1, 1923, no succession rights can be admitted. Such property comes under the decree of 1918 abolishing inheritance.[37]

Later, however, the soviet jurists paid more attention to a secondary clause of the Decree of April 27, 1918, permitting the close relatives of the decedent to have his estate, not exceeding 10,000 rubles, in "management and disposal." Some of these argue that, although the decree provided for "abolition" of inheritance, it established in fact inheritance of a special kind. Moreover, the Leningrad Regional Court recognized in a decision the effect of alienation by the heirs of property under 10,000 rubles received by them from a decedent before the effective date of the Code.[38] It is difficult to decide whether this decision was inspired by a new view on inheritance or by a new construction of Section 3 of the Enacting Law.

[36] Freund, Das Zivilrecht Sowjetrusslands (1924) 107.
[37] Malitsky 21; Nakhimson, Commentary 4.
[38] See Chapter 17, Inheritance Law, notes 13–18.

IV. Nationalization Under Militant Communism and Subsequent Denationalization

1. Houses

Not all prerevolutionary housing was nationalized in the Soviet Union. Although private ownership of land is abolished, nevertheless in 1928 in the R.S.F.S.R., privately owned houses constituted 85 per cent of the buildings in cities and occupied about one half of the housing space.[39] But only houses small in size and value had such status. The somewhat confusing situation is explained by the fact that the nationalization of property under Militant Communism was to a large extent a matter of fact, in the discretion of local soviet authorities, rather than of law. This is especially true of the confiscation of urban landed property. The Decree of August 20, 1918, declared the abolition of private ownership of land in all cities and towns. But with regard to the buildings themselves, the decree merely gave a blank power of confiscation to the local authorities as follows:

> 2. In urban settlements with a population of over 10,000, private ownership shall be abolished of all such buildings as with their lots exceed in value or in income a limit to be defined by the local authorities.[40]

The city government was authorized to take over the confiscated houses. Therefore, the term "municipalization" was used to designate this type of confiscation. Thus, whether a house could legally be taken from the owner depended upon the local restrictions. In fact,

[39] Private Housing, Collection of Decrees, Preface by Sheinis (in Russian 1928) 3.

[40] R.S.F.S.R. Laws 1917–1918, text 674, Section 2.

dispossession of owners went on without particular regard to any decrees of central or local authorities.

On the eve of the New Economic Policy, two decrees definitely ordered partial demuncipalization, i.e., restoration to the former owners of smaller houses. On August 18, 1921,[41] the local authorities were required to revise the lists of municipalized buildings and return those deemed unfit in size or otherwise for communal or governmental purposes. On December 28, 1921,[42] more definite prerequisites for the restoration of former ownership were set up. A house was to be returned if it was not occupied by an agency of the central or local government or an organized body of tenants, provided the area of useful space did not exceed two apartments, or twenty-five square *sazhen,* equal to 1,225 square feet, (except for the better residential houses), in the provincial cities, and not more than five apartments, or fifty square *sazhen,* equal to 2,500 square feet, in Moscow and Leningrad. When the Decree of May 22, 1922 was promulgated, promising protection by law to property rights, it became imperative to ascertain which houses were to enjoy such protection. This was especially important because in many instances one private person had dispossessed another private person. Several decrees sought to define a municipalized building as one actually taken into possession before May 22, 1922, thus recognizing seizure as equivalent to title. With regard to urban dwellings, the Decree of May 14, 1923,[43] stated:

[41] R.S.F.S.R. Laws 1921, text 409; 1 Civil Law Textbook (1938) 232. Sale of nonmunicipalized houses was permitted on the same day. R.S.F.S.R. Laws 1921, text 410.

[42] Resolution of the Council of People's Commissars, Bulletin of the People's Commissariat for the Interior, 1922, No. 3/4; 1 Civil Law Textbook (1938) 232.

[43] R.S.F.S.R. Laws 1923, text 465.

The following buildings shall be considered municipalized:
(1) Buildings which were municipalized by general orders of local executive committees concerning municipalization issued before May 22, 1922, in conformity with the requirements of Section 2 of the Decree of August 20, 1918;
(2) Buildings which were municipalized by special orders of the local authorities before May 22, 1922, even if such orders were not submitted (as required) for confirmation by the People's Commissar for the Interior;
(3) Buildings factually taken from the owners before May 22, 1922;
(4) Buildings which were taken wholly or in part before May 22, 1922. for the needs of governmental agencies or enterprises controlled by local authorities, or institutions or enterprises enjoying a similar status:
(5) Buildings which were mismanaged or kept in bad order, as established by a proper procedure in conformity with the Note to Section 11 of the Regulation Concerning Management of Housing of August 8, 1921 (R.S.F.S.R. Laws, text 411).

Likewise, a Decree of December 1, 1924,[44] stated:

The following buildings in rural localities shall be considered nationalized:
(a) Buildings which have been actually taken from the use of their owners prior to May 22, 1922, and have remained continuously since that date and up to the date of publication of the present decree under the control of the local executive committees and their agencies;
(b) Buildings occupied by governmental agencies or institutions, or organizations having the status of such agencies, provided such occupancy lasted continuously for not less than one year immediately preceding May 22, 1922;
(c) Buildings which belonged formerly to the local self-government, churches, and landowners, serve no agricultural purpose. and have not been classed as governmental landed property.

Accordingly, actual possession, if taken before May 22, 1922, vested title in the government. But other decrees stated an additional principle, viz., that a duly

[44] R.S.F.S.R. Laws 1924, text 910.

issued order for nationalization or municipalization is in itself insufficient title for government ownership unless followed by actual seizure.

Thus, a joint Instruction of the Commissariats for Justice, Agriculture, and the Interior of January 29, 1925, No. 49, stated among other things:

> An order issued prior to May 22, 1922, concerning the seizure of a building in a rural locality is in itself insufficient for recognition of such building as being in governmental ownership; such an order maintains its effect only if it was factually carried out before May 22, 1922, and was manifested in the removal of the owner from use and disposal of the building.[45]

Dates were fixed for presentation of claims of owners of houses who under the above decrees were authorized to have their titles recognized, and these dates have been deferred. Out of the registration of such claims with the municipal government has developed a soviet equivalent to a land title record. The lot appertaining to a privately owned house is in the ownership of the State, but possession of the house and its conveyance *inter vivos* and by descent are permitted and enjoy full protection by law. However, a prerequisite for recognition of such ownership of a dwelling house is that it has been "registered," i.e., entered upon a record kept by the city government in accordance with a Circular Letter of October 12/19, 1926, No. 404/183, and an Instruction of July 19, 1937, No. 95.[46] The title is entered for the applicant if he

[45] Alexandrovsky, Commentary (3d ed. in Russian 1926) 177; (1925) Soviet Justice No. 4; Bulletin of the Commissariat for the Interior, 1925 No. 4.

[46] This letter and instruction were issued by the R.S.F.S.R. People's Commissariat for Justice jointly with the Commissariats for the Interior and for Municipal Economy. (1926) Financial and Economic Legislation No. 46, 1809; (1937) *id.* No. 32/33, 23; 1 Civil Law Textbook (1938) 233; Zimeleva, Civil Law (1945) 87. It seems that at present they are replaced by a similar Instruction of December 25, 1945. Its full text was not available to the writer.

produces evidence that he is the successor in law to a person formerly registered as owner, or a court decision recognizing his right. Original entries are made only for such persons as are able to show succession to the owner, as of August 8, 1921, i.e., the original owner or a possessor on that date whose possession was then deemed equivalent to title. Thus, new actual possession alone is no longer equivalent to title. Only the entry upon the record certifies the title to a house.[47] For the validity of a transfer of title, there is required not only the notarization of the contract conveying the title but also a subsequent entry upon the record.[48] Conveyance of title by means of sale, donation, or testamentary disposition is limited only by the provisions of Section 182 of the Civil Code which bar the accumulation of more than one house in one family and any attempt at real estate business. These limitations again, according to some authors, are imposed only upon nonmunicipalized and demunicipalized houses and do not affect houses erected after the Revolution and owned privately.

The title entered upon the record covers the building itself but not the land appertaining to it, which remains in government ownership. However, the soviet jurists consider that the legitimate acquisition of a building in urban settlements carries with it the right to use the lot appertaining thereto.[49] In a recent study, the opinion was voiced that, in contrast to capitalist law, which follows the Roman law principle that a house is an appurtenant (accessory) to the land, the reverse is true under the soviet law. The lot is an appurtenance of the

[47] Braude, "Conveyance of Buildings" (1946) **Soviet State No. 7, 58.**
[48] Civil Code, Section 184.
[49] *Op. cit., supra,* note 47 at 58, 59.

house. The Roman maxim *superficies solo cedit*[50] (whatever is built on the land appertains to the land) should be changed for soviet law to *solum superficiei cedit*—land upon which a structure has been built appertains to the building. The same author criticizes the abolition of the terms "movables" and "immovables" stated in Section 53, Note, of the Civil Code. A house firmly fixed to the ground is certainly different from a prefabricated house sold from the factory.[51] All this shows how artificial and perhaps fictitious becomes the denial of private ownership of land with the simultaneous recognition of private ownership of houses erected on the land.

However, the rule that with the house is conveyed the right to use the lot, does not apply to buildings in rural localities. Members of the collective farms and independent farmers own their houses and may sell them. But the purchaser does not acquire thereby any right to the house-and-garden plot or even to the land under the house. He must obtain the assignment of such land from the local authorities, if the house is purchased from an independent farmer, or obtain membership in the collective farm and assignment from it of the house, if purchased from a collective farmer.[52]

The survivals of the prerevolutionary private urban landed property are not the only kind of private housing allowed under soviet law. Another kind, the so-called building tenancy, is discussed in Chapter 16, II.

[50] Gaius, Inst. II, 73. Fontes juris romani ante-justiniani, ed. Boviera (1940).

[51] *Loc. cit.*, note 47.

[52] *Ibid.*, at note 3.

2. Industrial Establishments

The principle that factual seizure in addition to a confiscatory decree is a prerequisite to the vesting of title in the government was followed also with regard to certain industrial establishments and led to controversy among the soviet and nonsoviet writers.

The central government decreed in 1918 the nationalization of large-scale industry and of some of the individual enterprises and branches of industry.[53] Yet the local authorities proceeded on their own initiative, wherefore the central government forbade in 1920 the nationalization of the smaller enterprises. But, on the other hand, the Supreme Economic Council, which was a kind of government department for industry, issued on November 29, 1920, a general Decree on the Nationalization of Industrial Establishments. This decree announced the nationalization of all privately owned industrial establishments employing more than ten workers, or more than five workers if a motor was used.[54]

However, according to the interpretation given to this decree by the Commissariat for Justice on June 19, 1921, it was intended merely to authorize the local government agencies to issue within the limits of the decree concrete orders for the nationalization of individual enterprises. Thus an individual enterprise still remained unnationalized although it fell within the decree, if no such concrete order had been issued.[55] Again, the decree has not been strictly followed. In many cases, small enterprises below the limits defined above were taken by the

[53] See Chapter 1, p. 11 *et seq.*

[54] R.S.F.S.R. Laws 1920, text 512.

[55] Gintsburg, 1 Course 175–6; Timasheff, Staatseigentum und Privateigentum in Sowjetrussland (1927), N.F. 8 Archiv für Civilistische Praxis 25; Shreter, Soviet Industrial Law (in Russian 1928) 64–65.

local soviets; in other cases, larger enterprises were either abandoned or still exploited by the former owners.[56]

Nationalization often meant the closing of the enterprise, so it was decided to stop further nationalization. By the Decree of the Council of People's Commissars of May 17, 1921, the order was given "to abolish for the future the effect of the Decree of the Supreme Economic Council of November 29, 1920, without abrogating those nationalizations which actually took place." [57]

In other words, this decree sanctioned factual possession of industrial enterprises by governmental agencies but sought to stop any further nationalization. Another Decree of October 27, 1921, stated more clearly that "all the enterprises which actually came into possession of the organs of governmental power (local or central) before May 17, 1921, are considered nationalized." [58]

Hence it follows that enterprises which were not taken in fact by the government still belonged to their owners. Subsequent legislation recognized this conclusion. But even before the Decree of October 27, 1921, namely on July 7, 1921, the size limits on private industrial establishments had been raised. The right to open and run establishments employing not more than ten or twenty workers (the latter limit was observed in practice) was granted to any citizen by the Decree of July 7, 1921.[59]

A joint Decree of the Central Executive Committee and the Council of People's Commissars of December 10, 1921,[60] sought to clarify the situation and ordered

[56] Shreter, *id.*
[57] R.S.F.S.R. Laws 1921, text 240, also text 230.
[58] *Id.*, text 583.
[59] *Id.*, text 323.
[60] *Id.*, text 684, italics supplied; re mills, *id.*, 1925, item 463.

the partial denationalization of industry in the following terms:

1. All industrial establishments subject to nationalization on the ground of the Decree of the Supreme Economic Council of November 29, 1920, are considered to have become the property of the republic *if their actual nationalization* took place.

2. Nationalization has actually taken place:

(a) If the establishment has been taken over by the authorities under a written record thereof;

(b) If [governmental] management of the establishment has been organized, or a manager appointed;

(c) If the expenses of running the business or of safeguarding the establishment have actually been paid by the government.

3. *All other establishments* mentioned in the above decree *which have not been actually nationalized* in accordance with Section 2 *belong to the former owners* who may use them in accordance with the law.

4. Establishments of small-scale and home industry (*Kustarnye*) which have been actually taken away from the owners by governmental agencies before April 26, 1919, are considered to have become the property of the republic, although they do not fall within the Decree of the Supreme Economic Council of November 29, 1920:

(a) Provided they are exploited by the government in their line of production;

(b) Provided the governmental agencies have added new technical equipment or supplies to these establishments.

All other home industry and small-scale establishments taken away from the owners by the local authorities without ratification by the Supreme Economic Council must be returned by the provincial economic councils to the owners, upon their petition.

Section 5 of the same decree authorized the Presidium of the Supreme Economic Council to return establishments employing fewer than twenty workers to the private owners if the establishments were not properly used by the government, even if they had actually been nationalized.

The salient point of the decree was that a direct, duly

issued order concerning the nationalization (confiscation) of certain property was considered in itself insufficent title for governmental ownership of such property, unless the order was followed by actual seizure of the property.

Professor Timasheff, formerly of Saint Petersburg University and now with Fordham University, and other writers have pointed out that this decree, as well as many others (see *supra,* p. 289), justifies the conclusion that in many instances a mere declaration of nationalization of property does not make it governmental if it was not seized before the restitution of recognition of private property rights.[61] Soviet and nonsoviet writers are unanimous in agreeing that this doctrine of factual nationalization applies in soviet law.[62] There is, however, a controversy concerning the limits of its application.

All writers agree that all the properties which were pronounced in the exclusive domain of governmental ownership by the Civil Code of 1922 (Sections 21, 53) are governmental, regardless of whether they were taken from the owners or not. Moreover, those which were actually taken by the government prior to May 22, 1922, are considered governmental, regardless of whether or not a decree announced at that time their nationalization.

Here, however, begins the controversy. Some writers accept this statement with the reservation that properties actually taken by the government, with or without a decree of nationalization, became government-owned

[61] Timasheff, *op. cit.*, note 55 at 27; *id.*, Nationalisierung der Banken in Sowjetrussland, *id.* Bd. 9, 16 *passim;* Fleishitz, Commercial Industrial Enterprise (in Russian 1924) 28.

[62] Timasheff, *op. cit.* 28; Gintsburg, Division of Property into State and Private (in Russian 1929) Revolution of Law No. 4, 38 *passim;* Fleishitz, *op. cit.* 28.

only insofar as their denationalization has not been decreed. They conclude further that, vice versa, all objects which actually remained in the possession of their owners during the period of Militant Communism (prior to May 22, 1922) must be considered as still belonging to them, although at the time of this experiment they were declared nationalized. In brief, except in the case of objects within the exclusive domain of governmental ownership under the soviet Civil Code, the decreed nationalization of any property must have been followed by actual seizure by the government before May 22, 1922, to constitute governmental ownership.[63]

The general point of view of the soviet writers is formulated by Gintsburg as follows:

> Governmental property is any property pronounced nationalized before May 22, 1922, in regard to which no subsequent decree was issued admitting it to private trade or requiring actual seizure by the government as a criterion of nationalization of such property. Any other property which, although never having been declared nationalized, was nevertheless actually taken by the government before May 22, 1922, is also governmental.[64]

The same writer thinks also that those objects which were declared nationalized under Militant Communism still belong to their owners if, by virtue of the Civil Code, they were admitted to private trade, e.g., automobiles, musical instruments. This point of view is clearly expressed in the Interpretation of the Commissariat for Justice of February 29, 1923, No. 204,[65] where it is stated that even if an automobile were concealed by the owner from the authorities to evade nationalization un-

[63] Timasheff, *op. cit.* in fine; Shreter, *op. cit.* 64.

[64] Gintsburg, *op. cit.* 51.

[65] Alexandrovsky, *op. cit.* (2d ed.) 205, (3d ed.) 875; Gintsburg, *op. cit.* 43.

der the Decree of 1919,[66] the automobile should remain his private property after the enactment of the Civil Code.

With regard to industrial establishments, the same Commissariat in 1927 interpreted the denationalization decrees to mean that establishments which were not actually taken from the owners still belong to and may be exploited by them.[67] Thus, theoretically, the former owner of a factory larger than that permitted to private ownership under Section 54 of the Civil Code, might have operated it.[68] The controversy was solved in an extralegal way by the Five-Year Plan, which put an end to private industrial enterprises. However, it is important to keep in mind the principle of factual nationalization in disputes over property, which, though coming under some one of the soviet confiscatory decrees, was located abroad and was not in fact seized.

V. Extraterritorial Effects of the Soviet System of Property

The sphere of property rights protected by law in the Soviet Union is narrow in comparison with that accorded by the laws of capitalist countries. Would, then, the soviet law recognize the acquisition by a soviet citizen of such property rights abroad as are denied him in his country, e.g., acquisition by inheritance or contract of real property or of a large-scale business? Furthermore, does the soviet law postulate that the nationalization decrees tantamount to confiscation without indem-

[66] R.S.F.S.R. Laws 1919, text 70.

[67] Interpretation of January 15, 1927 (1927) Soviet Justice 132.

[68] Shreter thought that in such cases the establishment belongs to the owner but a concession is required for exploitation. Shreter, System of Industrial Law (in Russian 1924) 8–9; *id.*, Domestic Trade (in Russian 1926) 17; *id.*, Soviet Economic Law (in Russian 1928) 42.

nity and issued in the early years of the soviet regime, should also apply to property located outside of soviet territory? No legislative enactment offers a direct answer to these questions. But ample statements bearing upon the first question are to be found in authoritative administrative decrees. Being in the main in favor of recognition of property rights acquired by soviet citizens abroad under foreign law, these statements contain nevertheless an important reservation, viz., that the recognized rights should not exceed the limits of what is permissible under general concepts prevailing in the soviet law. Being prepared to limit, with this reservation, the effect of soviet laws to the confines of the Soviet Union, the soviets claim, nevertheless, that the soviet decrees ordering nationalization of private property of individuals and legal entities should apply also outside of Soviet Russia.

Regarding the rights of soviet citizens, the People's Commissariat for Foreign Affairs, in its Circular Letters of April 12, 1922, No. 42,[69] of July 13, 1922, No. 52,[70] and October 23, 1925, No. 329[71] instructed the soviet representatives abroad to protect property rights of soviet citizens relating to property situated outside of Russia if such rights are recognized by the local legislation, notwithstanding the fact that no such rights are recognized in the Soviet Union. "For example," states Circular Letter No. 329, "a soviet consul may assist a soviet citizen in the exercise of ownership of land located in the country where the consul is stationed, although the right of private ownership of land is abolished in

[69] (1922) Vestnik (Messenger) of the Commissariat for Foreign Affairs No. 6, 179. Egoriev 186.

[70] Egoriev 188.

[71] *Id.* 187.

the Soviet Union." On the other hand, Circular Letters Nos. 42 and 51 state that claims and acts, though lawful under the laws of a foreign country but "obviously contrary to the views established in the Soviet Union as to the limits of what is permissible," must be especially considered in each case. In view of the importance which some European courts have attached to Circular Letter No. 42 and the reference to all the aforementioned circular letters as being still in effect made in the recent soviet discussion of the conflict of laws,[72] these documents need to be studied more closely. Letter No. 42 reads:

> Circular 42 of the R.S.F.S.R. People's Commissariat for Foreign Affairs, of April 12, 1922.[73]
>
> The legislation of any country that establishes a system of property law has effect only within the territorial confines of that country, but within these confines it extends to all property relations irrespective of the nationality of persons involved in such relations. Therefore, the regime of property rights established by the decrees of the Russian soviet government regulates only property relations in the territory of the R.S.F.S.R. But legal relations pertaining to property which is located outside of the territory of the R.S.F.S.R. and not connected with it, cannot be judged outside of the confines of the R.S.F.S.R. under the Russian laws, and they are subject to the effect of the local legislation, regardless of the nationality of the persons involved in such legal relations, even if they are Russian citizens.
>
> Thus, if a given legal institution is, in general, recognized under the local laws, then the fact of nonrecognition of this institution by our legislation need not in itself be an obstacle in the way of the protection of a given right by our diplomatic representatives and consulates, as a matter of general protection of legitimate interests of the Russian citizens.
>
> This is the general rule. However, the limits within which the protection of such rights may be extended shall also be determined by general bases of the concept of law of the soviet

[72] Peretersky and Krylov, 72: "The basic provisions of this circular letter are still valid."

[73] *Supra*, note 69.

State. No protection may be extended, therefore, to claims and acts which, though legitimate under the law of the country of a person's residence, are contrary to the opinions established in the R.S.F.S.R. as to the limits of what is permissible. This is subject to appraisal in each individual case.

Two additional Circular Letters of July 13, 1922, No. 51, and of March 23, 1925, No. 271,[74] reiterated the necessity of implementation of Circular Letter No. 42 by the soviet representatives abroad. They were instructed to make contact with foreign lawyers and ascertain those who would agree to represent soviet citizens and to communicate to the Commissariat the names of such lawyers, so that the soviet citizens concerned might be given this information. A special body of soviet lawyers was set up in the Soviet Union and attached to the Commissariat for Foreign Affairs to prosecute the interest of soviet citizens abroad.[75] Thus, steps were taken to bring such prosecution under the control of the soviet government. By the Circular Letter of September 26, 1923, No. 194,[76] the People's Commissariat for Justice instructed the notarial offices not to refuse to execute and certify contracts, conveyances, and other instruments involving property rights abroad. It reads in part:

> Property rights of R.S.F.S.R. citizens to be exercised abroad shall be judged under the laws of the country within which they are to be exercised; any interposing obstacle to the free exercise of such right would produce totally unjustified enrichment of foreign debtors and obligors to the prejudice of Russian citizens, for which reason such citizens are fully authorized to dispose of such rights, in particular to transfer these rights by all methods recognized by the R.S.F.S.R. Civil Code for the

74 Egoriev 188, 189.

75 Inyurkollegia (College of lawyers for foreign law) Moscow Neglinnaya 12.

76 (1923) Soviet Justice 886; Egoriev 190.

benefit of the R.S.F.S.R. citizens or aliens insofar as such transfer is not prohibited by some [soviet] decree.

When Circular Letter No. 42 became known to the European jurists, it was brought to the attention of the European courts in the litigations involving the title to property subject to nationalization in Soviet Russia but located abroad. Circular Letter No. 42 was referred to as evidence of the absence of any extraterritorial effect of the soviet confiscatory decrees, and some of the European courts accepted this point of view. In particular, the Commercial Tribunal of Marseilles based its decision of April 23, 1925, in *Etat Russe v. Companie ROPIT* among other things upon this circular letter. This is the only case instituted by the soviet government in a European court for recovery of nationalized property. The question of the territorial effect of the soviet confiscatory decrees arose mostly on actions of the prerevolutionary owners for recovery of their property. In the United States, at present, the problem is vital in cases involving the so-called Litvinoff assignment.[77]

These were the facts in *Etat Russe v. Companie Ropit*. Ropit was a Russian steamship company established in 1856. Some of its vessels were in ports

[77] Recent leading cases: United States v. Pink *et al.* (1941) 315 U.S. 203; Moscow Fire Insurance Co. *et al.* v. Bank of N. Y. (1939) 280 N.Y. 286 848, 308 U.S. 542; 281 N.Y. 818; 309 U.S. (1940) 624, 697.
The following comprehensive collections of Russian translations of the decisions of the nonsoviet courts involving application of soviet laws abroad have been published in the Soviet Union: Kelman, compiler, The Soviet Law Before the Foreign Courts (in Russian 1928), with bibliography; Plotkin and Blumenfeldt, compilers, Collection of Decisions of Bourgeois Courts in Soviet Property Disputes (in Russian 1932); Plotkin, editor, Collection of Decisions of the Foreign Courts in Disputes Involving Property Interests of the U.S.S.R. (in Russian 1934) forms No. 2 of Documents on International Policy and International Law. The following comprehensive surveys and digests were published outside of Russia: Makarov, "Die Französische Rechtsprechung in Russischen Sachen" (1933) 7 Zeitschrift für Ostrecht 427; Makarov, "Uebersicht der Judikatur ausländischer Gerichte in Russischen Sachen" (1935/36) 2 Zeitschrift für Osteuropäisches Recht 563.

not controlled by the soviets at the time when the nationalization of the merchant marine was enacted by the soviet Decree of January 25, 1918. The vessels left the port before the soviets took it, arrived at Marseilles (France) and there, on petition of the captain, some shareholders, and French creditors, a provisional administration was appointed by the French court. The soviet government was *de jure* recognized by France on October 28, 1924, and on February 4 and 10, 1925, a representative of the soviet government filed complaints with the Commercial Tribunal of Marseilles against the provisional administrators of Ropit, claiming recognition of the soviet ownership of the ships lying in French waters and belonging to the Russian steamship company Ropit. Plaintiff based his claim on the soviet Decree of January 25, 1918, on nationalization of the merchant marine in Russia and argued that this decree must apply by virtue of the recognition of the soviet government by France. Plaintiff argued further that by virtue of this decree the Russian steamship company Ropit had ceased to exist, and asked for annulment of the order establishing the provisional administration, or at least for appointment of two representatives of the soviet government to the said administration. The Commercial Tribunal of Marseilles held for the defendant by the decision of April 23, 1925, and judgment was affirmed by the Court of Appeals in Aix, December 23, 1925, and the Court of Cassation (*Requêtes,* March 5, 1928).[78] All three courts held that

[78] Decision of the court of original jurisdiction (Tribunal de Commerce de Marseilles), April 23, 1925, in (1925) Journal de droit international (Clunet) 391–395, also (1926) Sirey, Recueil Général 2 e partie 1–5; decision of the intermediate appellate court (Cour d'Appel, d'Aix), December 23, 1925, in (1926) Sirey, 2 e partie 5–6; decision of the court of last resort (Cour de Cassation), March 5, 1928 in (1928) Dalloz, Recueil Periodique, 1 e partie 81–85.

de jure recognition of a government does not imply an automatic application of all the laws of the recognized government. The Court of Appeals held in part:

> Thus, although the fact of the *de jure* recognition does not any longer permit the French tribunals to ignore the soviet law and to deny systematically its application *en bloc*, this does not prevent at all the authority of the judge to analyze in each given case, the wording and the spirit of the soviet law and to deny it any juridical effect when the court considers that this law is directed against the basic principles of the French political and social order.[79]

The Court of Cassation added the following:

> If, in principle, the courts of a country, when judging of a juridical situation which arose in the province of a foreign legislation, must do so by application of a foreign law, this rule, nevertheless, is binding upon the court only to the extent that application of the foreign law, or respect for rights acquired under this law, does not disagree with those principles, or the provisions of the national law of the court which are considered to be essential for the public order.[80]

Defining the nationalization under the Decree of 1918 as confiscation without indemnity, the courts deemed that the application of the decree runs counter to the French public order.[81] The Commercial Tribunal of Marseilles quoted the first paragraph of Circular Letter No. 42 and drew from it the following conclusion:

[79] (1926) Sirey, 2 e partie 6, first column.

[80] (1928) Dalloz, Recueil Periodique, 1 e partie 85, left column; (1928) Recueil Heptomadaire 181.

[81] The Court of Appeals said:

> The soviet decree on nationalization of private property in Russia including that belonging to foreigners, without a fair compensation to the owners, is clear confiscation in its pure aspect, an act of violence of the State over the individual for the purpose, as is clearly stated in the Constitution of the Soviet Union, of abolishing private property and establishing the dictatorship of the proletariat; legislation of such kind (concerning the nationalization of property) contradicts the very fundamentals upon which the edifice of French laws is based, which is constructed upon respect to property and inviolability of the rights which flow from it—for this reason such legislation has no direct or indirect application in the French courts. *Ibid.*

Thus here the agency of the U.S.S.R. which is in charge of foreign relations has recognized that the laws enacted by the soviets have no exterritorial effect and their enforcement may not be extended beyond the country where they were promulgated.[82]

Likewise the Court of Appeals pointed out that by Circular Letter No. 42 "the People's Commissariat reminded the ambassadors that the laws concerning nationalization have a limited territorial effect."[83]

Such interpretation, however, has been objected to by the People's Commissariat for Foreign Affairs and the soviet writers. On October 23, 1925, when the appellate proceedings were pending, the Commissariat hastened to issue the following circular letter:

Circular Letter of the People's Commissariat for Foreign Affairs of October 23, 1925, No. 329.[84]

The People's Commissariat for Foreign Affairs has directed the diplomatic mission by Circular Letter No. 42 of 1922, that the difference between the legal systems of the soviet republics and those of other countries should not prevent the diplomatic missions from protection of property rights of soviet citizens within the limits of law of the country where the mission is stationed.

Experience shows that attempts have been made to interpret Circular Letter No. 42 of 1922 presumably as a declaration of a basic soviet rule of conflict of laws, namely, to interpret the circular letter to the effect that the soviet government has presumably expressed in it its consent in principle with the rule that any property right of a soviet citizen or a legal entity, insofar as such rights come under consideration abroad, should be in all instances treated exclusively from the point of view of a certain foreign legislation.

Such construction is absolutely erroneous, and in no way may be deduced from the above circular letter which error induces the Commissariat to rule as follows:

82 (1925) Clunet 394; (1926) Sirey, 2e partie 5, central column.
83 *Loc. cit.* supra note 80.
84 *See supra* note 71.

1. As it appears from Circular Letter No. 42, it does not touch upon the question of conflict of laws between various legal systems. The purpose of Circular Letter No. 42 was to determine the line of conduct of the diplomatic missions and consulates in instances where in the absence of any conflict of laws between two legislations, the question of protection of a category of rights arises such as comes totally under the effect of a certain legislation. This is clearly stated in Circular Letter No. 42 itself. As regards the only possible pertinent problem of conflict of laws, viz., the instances of the use abroad of rights involving properties situated on the territory of the soviet republics or connected with this territory, Circular Letter No. 42 points out that this problem is not related to the objective of the letter.

2. The form in which the Circular Letter was issued, viz., the form of a departmental regulation, also conforms with the nature of the letter, not allowing to attribute to it the character of a source of rules of conflict of laws. In reality, the objective of Circular Letter No. 42 was to make clear to the diplomatic representatives of the soviet republics abroad a rule (which otherwise is uncontestable in the consular practice), by which the protection of property rights of their fellow citizens abroad must be extended even in instances in which the rights of these citizens are based upon civil laws of the countries where the representatives are stationed, such as are not in conformity with their domestic legislation.

For example, a soviet consul may assist a soviet citizen in the exercise of his right of ownership of land located in the country where the consul is stationed, although within the confines of the U.S.S.R. private ownership of land is abolished. Consequently, here, it is only elucidated that the soviet citizen may exercise outside of the confines of the Soviet Union rights based upon foreign laws and that, insofar as such rights may be violated in contravention of these laws, the soviet diplomatic and consular representatives may render assistance to such citizen in the protection of his rights.

3. In addition to the above, Circular Letter No. 42 may not be conceived as a rule of conflict of laws establishing the territorial limitations of the effect of the soviet laws also, for the reason that the soviet legislation does not contain any such rule, for which reason no departmental act may be referred to as a substitute for such rule not existent in the legislation.

[Soviet Law]

In view of the foregoing, in instances where a foreign court is bound under the domestic law to apply to the solution of a question the law of another country, nothing in the soviet legislation prevents, in cases where a soviet republic happens to be such other country, the taking into consideration by the given court, of the laws of that republic equally with any other laws also foreign to the given court.

You may use the present circular letter in any manner which you deem appropriate in order to dispel the error in the interpretation of Circular Letter No. 42 that has taken place.

Prior to the issuance of Circular Letter No. 329, the soviet legal writers either referred to Circular Letter No. 42 in a somewhat general way, implying a possibility of its broad construction,[85] or suggested in a noncommittal way that its wording placed too categorical a limitation on the effect of the soviet laws and that exceptions to such limitations must be admitted.[86] After the above-quoted French decisions and the issuance of Circular Letter No. 329, the soviet writers became unanimous in attacking the conclusions drawn by the French court. Professor Kelman was the first to express this point of view in the following terms:

> Naturally, Circular Letter No. 42 did not have the meaning which the French court intentionally ascribed to it. Some doubts which arose in connection with the wording of the circular which is not quite clear were later authentically interpreted by the Circular of the Commissariat for Foreign Affairs of October 23, 1925, No. 329, wherein it was stated that Circular No. 42 did not establish any rule of conflict of laws but merely indicates that the property relations, whose objects are beyond the territory of the Soviet Union, come under the local laws even if the persons involved are soviet nationals.[87]

[85] Makarov, Basic Principles of the Private International Law (in Russian 1924) 85.

[86] Peretersky, Outline of Private International Law (in Russian 1925) 118, 128.

[87] Kelman, Soviet Law before the Foreign Court (in Russian 1928) 51, note 1.

The subsequent soviet treatises on conflict of laws vigorously deny the conclusions drawn by the French court, insist that any limitation of the soviet confiscatory decrees to soviet territory is not germane to soviet law, but fail to indicate any statutory provisions supporting their view.[88]

It may be observed that the point of view expressed in Circular Letter No. 329 and by Professor Kelman and others lacks logical consistency. The problem of what law shall apply to an alien with regard to the exercise of private rights outside of his own country is a problem of conflict of laws. If a government agency, charged with foreign affairs, instructs its agents to protect their nationals in the exercise of such rights abroad as are prohibited to them at home, it certainly establishes thereby a rule of conflict of laws. Executive acts issued by proper authorities within their jurisdiction are certainly a source of soviet law and consequently a source of rules of conflict of laws unless they contradict a legislative enactment. But no legislative enactment is cited by soviet jurists which would declare principles contrary to Circular Letter No. 42. Circular Letter No. 329 does not repeal Letter No. 42 but merely seeks to apply a certain principle of conflict of laws in some instances and to deny its application in others. Such inconsistency does not appear to be well justified and therefore does not seem to affect the cogency of the logical conclusion deduced from Circular Letter No. 42 by the French court.

[88] Raevich, Private International Law (in Russian 1934) 168, 329; Koretsky, International Economic Law (in Russian 1927) 88, note 6. Peretersky and Krylov 96 *et seq.* devotes a whole chapter to this problem without referring to a single soviet enactment.

VI. Continuity of International Obligations Assumed by Presoviet Russia

It is generally believed that the soviet government has repudiated all the international obligations of presoviet Russia. However, an explicit repudiation of the old international treaties and agreements made in the soviet statutes refers in fact only to two of their categories, viz., to secret treaties and to foreign loans. The Act of January 28, 1918 states plainly:

> 3. All foreign loans are hereby annulled unconditionally and without exception.[89]

The Decree of October 28, 1917, on Peace contains the following provisions:

> The [soviet] government abolishes secret diplomacy, expressing on its part the firm intention to carry all negotiations openly before the public and initiating immediately a complete publication of all secret treaties, ratified or entered into by the government of landowners and capitalists prior to October 25, 1917. The government declares *the whole content of these secret treaties unconditionally and immediately abolished* insofar as it is directed to furnish the benefit and privileges to the Russian landowners and capitalists, as is the case in the majority of instances.[90]

The intention stated in the first sentence apparently has been changed. The qualifying clause of the second sentence was somewhat disregarded, and the provision has been understood as a repudiation of all old secret treaties. But no general statement has ever been made in the soviet official acts regarding all the other international treaties and obligations, i.e., treaties which are not secret and those which are not concerned with foreign loans. Some of the official statements made by

[89] R.S.F.S.R. Laws 1917–1918, text 353. See also *id.*, text 386.
[90] *Id.*, text 2.

the soviet government were occasionally couched in such general terms as to suggest the general intention to repudiate all presoviet international obligations. But even in such instances the statements were made invariably in direct connection with the discussion of financial obligations only, for example, the memorandum submitted at the Genoa Conference on April 20, 1922.[91]

The situation is not quite clear regarding nonsecret agreements not concerned with foreign loans. In some instances the soviet government declared in an official act its "recognition of the force" of certain old treaties. On these occasions the soviet attitude was expressed precisely in these terms in contradistinction to "accession," which term was used by the soviet government when it declared adherence to some treaty made by other powers after the soviet government came into being.[92] Moreover, there are also instances in which an old treaty or convention had been considered by the soviet government to be in force by implication. Let us look at both instances more closely.

A communique of the Council of People's Commissars, addressed to the International Committee of the Red Cross and intended for all countries recognizing the Geneva Convention, was printed in *Izvestiia* of June 4, 1918. There it was stated that the soviet Russian government recognizes and will observe the Geneva Convention and "all other international conventions and agreements relating to the Red Cross that have been recognized by Russia before October, 1915." In 1922 the Commissariat for Foreign Affairs began to publish a collection of treaties "in force" entered into by the

[91] For its English translation see Taracouzio, The Soviet Union and International Law (1935) 249.

[92] U.S.S.R. Laws 1925, text 503, Section 5 regulated such accession.

R.S.F.S.R. (later by the U.S.S.R.). In Volume I covering treaties "in force on January 1, 1921," the above-mentioned communique was printed under the title "Decree on the Recognition of all Conventions Concerning the Red Cross." [93] In the same volume, three other conventions were printed, in connection with which no statement had been made previously; viz., the Hague Convention of December 21, 1904 for the exemption of hospital ships from harbor dues and fees,[94] and the Geneva Convention of July 6, 1906, for the amelioration of the condition of the wounded of the armies in the field,[95] and the Hague Convention of October 18, 1907, concerning the adaptation to naval war of the above Geneva Convention.[96] While the text of all new treaties made by the R.S.F.S.R. itself is followed by the reference to the soviet law gazette in which the treaty is published, these three old conventions are followed by a reference to the promulgation in the imperial law gazette. Later, on June 16, 1926, a formal act was passed by the soviet government concerning the recognition of these conventions, and their text was reprinted in the soviet law gazette in 1926,[97] while in the later editions of the above-mentioned collection only a reference to this was printed.[98] In the statements made by the soviet government during World War II, occasional mention was made of these conventions as binding upon the Soviet Union. For example, Molotov's note of April 27, 1922, speaks of "obligations undertaken by the Soviet Union in the matter of treatment of prisoners of war,

93 1/2 Sbornik (2d ed. 1922) 226; *id.* (2d rev. ed. 1928) 359.
94 1/2 Sbornik (2d ed. 1922) 228.
95 *Id.* 230.
96 *Id.* 239.
97 U.S.S.R. Laws 1926, Part II, texts 226 (Declaration of June 16, 1925) 227, 228, 229.
98 1/2 Sbornik (2d rev. ed. 1928) 360.

under the Hague 1907 Convention." Commenting upon Sections 193 [29] and 193 [30] of the Criminal Code dealing with maltreatment of prisoners and wounded and abuse of the sign of the Red Cross, the textbooks on criminal law state that these sections were included "in accordance with the Hague Convention of 1907." [99] In this instance, the force of these conventions during the interim from 1921 to 1926 was apparently deduced by implication.

The case of the Washington Convention of June 7, 1911, for the preservation and protection of fur seals, has been somewhat different. A statute had been enacted in 1926 declaring the recognition of the force of the convention and providing for its domestic enforcement. The text of the convention had been promulgated in the soviet law gazette [100] and then had been included in the next volume of the above-mentioned collection.[101] Again, in Volume III of this collection, some other old conventions are mentioned among those "the force of which was recognized" by the Soviet Union, although without reference to an act declaring such recognition. Thus the St. Petersburg telegraph Convention of July 22, 1875, and the London radio telegraph Convention of July 5, 1912, were mentioned. Apparently they were considered in force by implication.[102]

Under these circumstances it may be deduced that whenever an express recognition by the soviet government of an old treaty has taken place or may be presumed by implication, the soviet government may be

[99] Criminal Law, Special Part, Goliakov, editor, (in Russian 1943) 446; *id.* (1939) 482; Trainin and others, The Criminal Code of the R.S.F.S.R., a Commentary (in Russian 1941) 237; *id.* (2d ed. 1946) 267.

[100] U.S.S.R. Laws 1926, Part II, issue dated April 17, 1926.

[101] 3 Sbornik (1927) 128.

[102] *Id.* 277.

expected to accept the obligation flowing from such a treaty. It may also be argued that, in view of the absence of a general derogation of old nonsecret treaties not concerned with foreign loans, the recognition of the effect of such a treaty is no more than a means of publicizing its enforcement and therefore that such treaties should be binding upon the soviet government even without a special act of recognition, unless expressly denounced. No soviet statutory provision precludes such an interpretation.

Chapter 9

Conditional Protection of Private Rights

I. Social and Economic Purpose of Private Rights

1. Origin of the Provisions of Sections 1 and 4 of the Civil Code

The New Economic Policy, discussed at length in Chapter 1, established the possibility of acquiring new private rights as contrasted with the complete denial of them under Militant Communism (1918–1921). The legal aspect of this policy, announced in 1921, was summarized in the title of one of the basic decrees (May 22, 1922), which opened the new era and was the embryo of the Civil Code, as follows, "On fundamental private property rights recognized by the Russian Soviet Republic, secured by its laws and protected by its courts." In general, the framers of the Civil Code outlined private rights after the pattern of capitalist codes but did not intend to offer these rights unconditional protection. They sought to neutralize the effect of borrowing of capitalist provisions by inserting clauses implying the condition under which a right is protected. Thus, Sections 1 and 4 of the Civil Code were designed by the framers of the Code to define the status of private rights under the New Economic Policy.

The general declaration of legal capacity was couched in language stressing the purpose for which private rights gained recognition. Section 4 of the Civil Code reads:

4. For the purpose of the development of the productive forces of the country, the R.S.F.S.R. has granted legal capacity (the capacity of having private rights and obligations) to all citizens who are not restricted in their rights by sentence of court.

The implied possibility of a withdrawal of the grant if and where it does not serve the purpose was expressly stated in the following terms of Section 1:

1. The law protects private rights except as they are exercised in contradiction to their social and economic purpose.

Thus, the simple opening passage of Section 1, "The law protects private rights," is followed by a qualifying clause. No such protection was promised whenever a private right "is exercised in contradiction to its social and economic purpose." Likewise, the wording of Section 4 emphasizes a merely conditional recognition of private rights. The legal capacity of private persons is defined as a "grant" made by the soviet State to citizens and not as a recognition of the innate right of every human being. This grant was made "for the purpose of development of the productive forces of the country" (Section 4). For the explanation of the underlying idea of these clauses, the recent soviet textbook of 1938[1] (as did its predecessors) referred to the following statement made by Lenin on the eve of the preparation of the Civil Code, on February 6, 1922:

We do not recognize anything "private"; for us everything pertaining to the economy is a matter of public and not private law. The only capitalism we admit is the State capitalism. . . . Hence, we must enlarge the interference of the State with the relations pertaining to "private law," enlarge the right of the government to annul, if necessary, "private contracts"

[1] 1 Civil Law Textbook (1938) 32.

and to apply to private law relations not the *corpus juris romani* (*sic*) but our own revolutionary concept of law.[2]

In view of this program, the framers of the Civil Code undertook to find a general restrictive formula which would go much further than mere prohibition of the misuse of one's own rights at the expense of another's, as exemplified by the law of nuisance in American and English law,[3] *Schikane* in German law,[4] *abus de droit* (unreasonable use of rights) in French law,[5] and bad faith in Swiss law.[6] The framers of the soviet Code sought a check upon the possible growth of private capitalism, a "Damocles' sword" over private rights, in the words of Stuchka, at one time Commissar for Justice, later Chief Justice, and authority on civil law.[7] Private property rights were to enjoy relative security, i.e., to the extent that they were not in conflict with the social order which had to remain essentially socialistic. Neither the soviet leaders nor the framers of the Civil Code were certain how far the admittance of private initiative in national economy should go and how long it might last. They needed an elastic formula and refrained from writing into the legislative text a clear statement of policy. As a result, the framers of the Code resorted to such doctrines of Western European

[2] Lenin, 29 Collected Works (Russian 2d ed.) 419, in 1 Civil Law Textbook (1938) 32.

[3] For an exposé of Anglo-American doctrine made for the purpose of comparison with Section 1 of the Civil Code, see Greaves, "The Social-Economic Purpose of Private Rights" (1934–1935) 12 N. Y. U. L. Quar. Rev. at 187 *et seq.*

[4] German Civil Code (BGB), Article 226:

226. The exercise of a right which can only have the purpose of causing injury to another is unlawful. Eng. tr. by Wang, p. 41.

[5] *Op. cit. supra*, note 3 at 441 *et seq.*

[6] Swiss Civil Code of 1907, Article 2:

2. Everybody must, in the exercise of his rights and the performance of his duties, act with truth and faith. (*nach Treu und Glauben*) Eng. tr. by Shick, p. 1.

[7] Stuchka, 2 Course 249.

writers as appeared to represent the socialist trend, in a broad sense, in modern legal thought. The restrictions on private rights in the soviet Code were formulated under the distinct influence of the teachings of the French writers, Saleilles and Leon Duguit, both well-known to Russian jurists. To an extent, the terminology was borrowed from the same source. Thus, the formula of Section 1 has no precedent in the legislation of any other country. Yet several Western European legal writers may be quoted as direct precursors of the doctrine implied in the section.

2. Western European Precursors of Section 1

Gustav Schwarz, a professor in Budapest, was perhaps the first of the Western European jurists to emphasize that behind the protection of a right to a thing is the desire to secure the use of the thing in accordance with its purpose:

> Legal order requires in fact of everyone that he manage the properties in his power with care and in such a way as to make the property serve its purpose. It is true that this rule has never been expressed in legislation, nor have all the necessary conclusions been drawn. However, the law reacts against the most striking violation of this rule when it deprives a spendthrift of the administration of his property.[8]

Leon Duguit, as early as 1912, saw in the development of modern jurisprudence a trend toward a new concept of right which he termed "socialist and realistic," as against the "individualistic and metaphysical" concept of natural rights:

> Man has no rights . . . but every individual has in the community a certain function to perform, a certain task to ful-

[8] Gustav Schwarz, "Rechtssubjekt und Rechtszweck" (1908) 32 Archiv für Bürgerliches Recht 38. See also Tuor, Das Neue Recht (1912) 42.

fill. And this is precisely the foundation of the rule of law which applies to all, great and small, the governors and the governed. . . .[9]

Ownership is not a right, it is a social function. The owner, that is to say the holder of a value, has to perform a social function because of the very fact of his holding this value; insofar as he fulfills this mission his acts as owner are protected. If he fails to fulfill it or does so improperly, if for instance he does not cultivate his land or lets his house fall to pieces, an intervention by the government is justified to compel him to perform his social function as owner, which consists in ensuring the use of the values he holds conformably to their destination.[10]

The holder of a value does not have a right to it; it is a factual situation which binds him to a certain social function and his property is protected to the extent and only to the extent that he fulfills such social function.[11]

A direct prototype of the provisions of Section 1 of the soviet Civil Code may be detected in the explanation given by the French writer, Saleilles, respecting the denial of judicial protection in case of *abus de droit*—the improper exercise of legal rights, analogous to nuisance. The reason is, according to Saleilles, that *abus de droit* is an "abnormal exercise of the right, an exercise contrary to its economic or social purpose."[12]

For a time the writings of these two French scholars, and of Duguit especially, were used by many soviet jurists in the interpretation of Section 1.

[9] "L'homme n'a pas de droits; la collectivité n'en a pas d'avantage. Mais tout individu a dans la société une certaine fonction à remplir, une certaine besogne à exécuter. Et cela est précisément le fondement de la règle de droit qui s'impose à tous, grands et petits, gouvernants et gouvernés." León Duguit, Les Transformations genérales du droit privé depuis le code de Napoléon (1st ed. 1912) 19–20.

[10] *Id.* 21.

[11] Duguit, 3 Traité de droit constitutionelle (2d ed. 1923) 618.

[12] "La véritable formule serait celle qui verrait l'abus de droit dans l'exercise anormal du droit, exercise contraire à la destination économique ou sociale du droit subjectif, exercise rétrouvé par la conscience publique et dépassant par conséquent la contenu du droit." Saleilles, Etude sur la théorie générale des obligations (2d ed. 1904) 371, note.

3. Comments by Soviet Jurists

Malitsky, soviet professor of law and the editor of a commentary on the Civil Code which went through three editions before 1927, explained the restrictive clauses of Sections 1 and 4 as follows:

> The government has granted rights to citizens not in the name of abstract rights of man . . . but exclusively for its own purpose. This purpose is the development of the productive forces of the country.
>
> Rights as a social function, private right as a social duty, subordination of the private interest to the common, and coordination of private purposes with those of society—this is the purpose of private rights and the essence of their grant to private persons . . . the proletariat bestowed rights upon the citizens of its State, but set for each person limits to private liberty to be observed in the exercise of private initiative. Private persons must not go beyond the limits established by law. Here lies a basic difference between our law and capitalist law. The capitalist law is based upon the abstract "natural rights" of a person; it places the person in the center of the world and surrounds him with a cult and therefore establishes the limits of the State . . . however the proletarian State set the limits not to itself but to its citizens.[13]

Another soviet writer offered the following combination of the restrictive provisions of Sections 1 and 4:

> Private rights have now acquired the character of social service and are not unconditionally protected by law; but on condition that they are exercised in accordance with their social and economic purpose, which consists in their serving as a means for the development of productive forces.[14]

Under the policy of complete elimination of private business which gained its full swing around 1930, new authorities in soviet civil law, such as Gintsburg, sought to amplify the formulas of Sections 1 and 4. Thus, the

[13] Malitsky 9–10.
[14] Slivitsky in *op. cit. supra*, note 13, at 30.

approved textbook on civil law, according to the terminology of that time called "economic law," in 1935 stated as follows:

> The purpose of the soviet law is not the development of the productive forces in general but their development in a definite direction, namely, toward socialism. The concept of "development of the productive forces" is a neutral concept from the point of view of class war. Used as a criterion for a scholarly analysis of the soviet law, it may and did actually lead to the undermining of the qualitative difference (from the class point of view) between the soviet and bourgeois law. The employment of this concept by the courts has resulted in a perverted interpretation of Section 1 of the Civil Code, reducing it to the law of nuisance (*Schikane*). This section has been erroneously interpreted as if every owner were endowed with certain authority in regard to the development of the productive forces of the country and therefore may not be deprived of property without compensation under any circumstances.[15]

It is obvious that the author called for a more restrictive check on private rights. This was not an isolated opinion. In a draft of a federal civil code prepared in 1931, it was proposed to change the indefinite formula of Section 1. Protection of private rights was to be denied wherever the exercise of these rights contradicted:

> The general background of private transactions in Soviet-land (viz.): (a) firmness of the proletarian dictatorship and socialist ownership of land, factories, plants, transport and other basic means of production as well as maintenance of the monopoly of foreign trade and banking; (b) protection of vital interests of the working class and the working rural masses; (c) stability of the single national plan of socialist reconstruction of the national economy.[16]

However, the draft never became law, and the proposed broad restrictive formula never was written into

[15] Gintsburg, 1 Course 110.

[16] Fundamental Principles of Civil Legislation of the Soviet Union. A draft edited by Stuchka (in Russian 1931) 9.

the statute books, although its influence may be traced in Sections 4, 6, and 9 of the 1936 Constitution (see *infra,* II, 3, and Chapter 16). Moreover, the entire textbook of 1935 later was condemned, and the more recent textbook of 1938 termed its predecessor "a distortion of soviet legislation and the teachings of Marx and Lenin on law." [17] Unlike the previous soviet writings on private law, the new textbook tacitly passes over the discussion of the significance of the clauses on the "social and economic purpose" of rights and their relation to the "development of productive forces." But the attempt of earlier writers to resort to the teachings of Duguit is criticized, and, in the passage condemning the doctrine of the French jurist, a tendency to uphold the security of rights may be detected. Says the textbook of 1938:

> The "theory of social functions" of the French jurist, Duguit, appears to be, as is well-known, a pro-fascist theory. The doctrine of Duguit concerning class solidarity under capitalism, his denial of private rights, his demagogic teaching on private property as a social function, were later widely used by the fascist "theorists" for the purpose of strengthening the exploitation of the toiling masses by monopolistic concerns and for the abolition of bourgeois democratic liberties and suppression of personality. This completely bourgeois "theory," Goikhbarg transferred into the soviet legal literature, presenting it as the last achievement of "science." Sections 1 and 4 of the Civil Code were treated by the Duguitists in the spirit of the theory of social function. . . . In fact, the soviet legislation did not have and could not have anything in common with the theory of social functions. Section 1 of the Civil Code . . . was directed in the first years of the New Economic Policy against private owners who abused, prejudicially to the interests of the proletarian State, rights granted them. It was not the purpose of Section 1 of the Civil Code to transform the soviet citizens into the subjects of obligations; on the contrary,

[17] 1 Civil Law Textbook (1938) 43.

by protecting the interests of the State . . . this section, as well as the entire Code, secured the interest of the toilers. Therefore, the Supreme Court infrequently invoked the necessity of a careful and thoughtful application of Section 1 of the Civil Code.[18]

The hint that Duguit doctrine influenced fascist legislation may now be considered well founded. But, strangely enough, it is precisely the doctrine of right as a social function, once popular in soviet jurisprudence, that has won official recognition in the "swan song" of fascist legislation, the new Italian Civil Code of 1942 enacted on the eve of the allied invasion, April 21, 1942. As stated in the *Relazione,* the official report accompanying the Code, the compilers of the Code were inspired by the idea that the Fascist State "does not recognize the protection of private ownership as an innate right of the individual. Like all other rights, ownership has a social purpose and the legal order confers rights upon an individual because of such purposes."[19] So while losing ground in Soviet Russia, Duguit won in Fascist Italy on the eve of the fall of the Fascist regime. (See *infra,* under 9.)

4. Discussion of Section 1 in European and American Legal Publications

The restrictive clause of Section 1 caused a large number of special studies to appear in the soviet and nonsoviet law reviews.[20] Two of them deserve to be men-

[18] *Id.* 38.

[19] Gazzetta Ufficiale 1941, edizione straordinaria No. 31 bis.

[20] Soviet writers:

Kelman, "Zu Art. 1 der Zivilgesetzbücher der Sowjetrepubliken" (1928) 2 Zeitschrift für Ostrecht 298–315.

Kelman, "The Dispute about Section 1 of the Civil Code" (in Russian 1927) Messenger of Soviet Justice No. 18.

tioned as substantial monographs: a study by Kelman, professor in Kiev (Soviet Russia), which appeared in more detailed form in German (1928), and a later work by Valerian Greaves in the United States (1934–1935),

Raevich, "On the Preparation of the Federal Principles of Civil Legislation" (in Russian 1927) Sovetskoe Pravo No. 3, 45.

Agaston, in Commentary to the Civil Code, edited by Goikhbarg (in Russian 2d ed. 1925) 31–35.

Dubinskii, "More on Section 1 of the Civil Code" (in Russian 1927) Messenger of Soviet Justice No. 11.

Rubinstein, "The Principle of Social and Economic Destination of a Right in the Civil Code" (in Russan 1926) Sovetskoe Pravo Nos. 3 and 4.

Dobrov, "Section 1 of the Civil Code" (in Russian 1927) Pravo i Zhizn No. 1.

Dobrov, "Customary Law and Section 1 of the Civil Code" (in Russian 1925) *Trudy* of the Commission for Study of the Ukrainian Customary Laws 3–12.

Guliaev, "Basic Principles of the General Part of the Civil Code" (in Russian 1924) *Trudy* of Kiev Institute of National Economy No. 2, 129–131.

Farbstein, "Section 1 of the Civil Code and the Rights of Governmental Agencies" (in Russian 1924) Soviet Justice No. 27.

Thal, "Die Schranken des Schutzes von Privatrechten nach § 1 des Zivilkodex der U. d. S.S.R.," (1926) 2 Ostrecht 402–412.

Thal, "Pachtvertrag über eine Staatliche Mühle" (1927) 3 Ostrecht 338–339.

Nonsoviet writers:

Greaves, "The Social-Economic Purpose of Private Rights" (1934–1935) 12 N. Y. U. L. Quar. Rev. 165–195, 439–466.

Rabinowitsch, "Die Anwendung und Auslegung des sowjetrussischen Zivilgesetzbuchs" (1927) 42 Zeitschrift für vergleichende Rechtswissenschaft, 30–46; see review in (1927) 1 Zeitschrift für Ostrecht 472–473.

Rabinowitsch, "Die Anwendung der Zivilgesetze in der Sowjetunion" (1926) 56 Juristische Wochenschrift No. 4, 352.

Freund, "Zur Anwendung des Artikel 1 BGB auf Pachtverträge" (1927) 1 Zeitschrift für Ostrecht 1035–1039.

Freund, Das Zivilrecht Sowjetrusslands (1924) 115.

Wenger, "Zum Zivilrecht Sowjetrusslands" (1926) 20 Archiv für Rechts- und Wirtschafts-philosophie 3–56.

An article by Schöndorf, a German professor, is discussed and extensively quoted in Stuchka, 2 Course of Soviet Civil Law (in Russian 1929) 252–254, without indication of the publication. The writer has not been able to identify and locate the publication.

All soviet and nonsoviet general treatises on the soviet civil law discuss Section 1 at length. Among nonsoviet treatises, the following may be mentioned:

Das Recht Sowjetrusslands hrsg. von A. V. Makletzov (1925) 255–257.

Eliachevitch, baron Nolde, and Tager, 1 Traité de droit civil et commercial des Soviets (1930) 56–76.

which offered a comparison of the clause not only with Roman and modern Continental European law but also with American and English law. Both of these took into account the application of Section 1 by the soviet courts, and they concurred on certain points. Neither the wording of the Section nor any excursion into the underlying legal philosophy of soviet legislators and of the Western European jurists whose statements inspired the framers of the Code, elucidates the limitation of private rights under this Section. In all known jurisdictions, exercise of a private right may be curtailed whenever it collides with an equally protected private right of another, with a justified higher public interest of the community, or with good morals.

Did the application of Section 1 by the soviet courts go beyond that, as is suggested by the circumstances under which the Civil Code was enacted and by the early commentators of the Code referred to above? The opinions of the writers vary. Those who have examined the problem more recently are rather evasive. In general, restrictions of private rights actually applied by the soviet courts have appeared to be far less radical and novel than might be expected. And yet certain instances do not fall in with the hitherto known precedents. The soviet courts were no less confused than the theorists.

5. Application of Section 1 by the Soviet Courts

The first problem was to find the criterion for the determination of the "social and economic purpose" of a right. Instances where such purpose was expressly stated in soviet legislation were obviously scarce. Therefore, the courts had to proceed in accordance with the

general rule established for cases where the court faced a gap in legislation, viz., Section 4 of the Code of Civil Procedure. It reads:

> In the absence of legislative enactment or decrees bearing upon the decision of a case, the court shall decide the case guided by the general principles of soviet legislation and by the general policies of the workers' and peasants' government.

Consequently, the general policies of the soviet government were almost invariably invoked by the soviet courts, in cases where the exercise of a private right was pronounced restricted under Section 1 of the Civil Code. Prior to 1935, the functions of the federal Supreme Court of the Soviet Union were those of a legal adviser to the federal government rather than of judicial review.[21] It had no power to repeal decisions of the supreme courts of the soviet constituent republics. So the supreme courts of the R.S.F.S.R. and the Ukrainian Soviet Republic, both having full power of judicial review within these most important states of the Union, were called upon to interpret the identical provisions of Section 1 of the Civil Codes of the R.S.F.S.R. and the Ukrainian Soviet Republic.

In 1924, during the second year of the life of the Civil Code, the R.S.F.S.R. Supreme Court warned the lower courts that they should not, as they did, refer unduly to Section 1 of the Civil Code and Section 4 of the Code of Civil Procedure merely to avoid the solution of a difficult situation.[22]

In 1926 the same Supreme Court surveyed the application of Section 1 as follows:

> It may be stated that Section 1 of the Civil Code has not as yet attained a clear application in the decisions of our courts.

[21] U.S.S.R. Constitution of 1923, Section 43, quoted in Chapter 7, note 89.
[22] (1924) Soviet Justice No. 51, 1243.

The trouble is that our theoretic writings, interpreting the essence and the significance of this section, have not given any more or less fortunate example of proper application of this section; the section has too often been resorted to for a mere simplification of the task faced by the court. No wonder that courts frequently apply this section so unfortunately as to require the Civil Division of the Supreme Court either to set aside such decisions or eliminate from the decision the part relating to the improper application of Section 1.

The Supreme Court gave the following examples of application of Section 1 by the lower courts which the court considered erroneous:

1. The court referring to Section 1 voided a contract of lease of a mill from the local soviet by a private person on the basis that a governmentally owned mill cannot be used for profit by a private lessee and must belong to a peasant mutual aid committee.

2. In another similar case, a contract of lease of a mill became unprofitable for the local soviet after one year of life; therefore, the court held that further enjoyment by the lessee of his right contradicts its social and economic purpose and cancelled the contract.

3. In a third case the plaintiff did not make any use of his tableware and was uselessly keeping it idle in a cellar. The court held that this contradicts the social and economic destination, etc.

The Supreme Court concluded:

In general, inasmuch as no firm opinion concerning Section 1 has been established, the Civil Division of the Supreme Court held that it would be better if the courts make less use of this section and pay more attention to the concrete circumstances of the case, which would reduce the number of mistakes in application of the section. The more so, because the courts very often have the tendency to make a mere reference to Section 1 where it has no bearing upon the case, instead of analyzing and clarifying all the circumstances of the case.[23]

More explicitly, in the following year, the Supreme

[23] "Report on the Activities of the Civil Division of the R.S.F.S.R. Supreme Court in 1925" (1926) Soviet Justice No. 4 at 109–110.

Court instructed the lower courts that "in each case the court must establish what violation of Section 1 of the Civil Code in particular was committed by the litigant whose right was denied protection. Did the party abstain from making any use of the property to which he was entitled or did the party use it contrary to its purpose?" [24] From this it may be concluded that an owner or a lessee of a property must make use of the property in order to have his right protected. This conclusion was drawn in many cases where the supreme courts both of the R.S.F.S.R. and of the Ukraine held the application of Section 1 of the Civil Code to be correct. In others, the conclusion was denied as it was in the case discussed by the Supreme Court in 1926 under 3, *supra*.

The rich variety of cases known to be decided under Section 1 may be divided into two groups: (a) decisions which do not appear too much out of line with administration of justice in modern countries; (b) decisions which would be hardly possible in a nonsoviet jurisdiction.

6. Soviet Decisions in Accord with Modern Legal Doctrine

The following digests of the principal cases of the first group are given by Greaves:

"(1) The owner of a lot erected a structure with the sole purpose of spiting his neighbor. (2) A concession holder unreasonably used water springs on his lot, thereby causing damage to the neighboring land tenants. (3) An owner failed to take necessary measures to prevent the impending collapse of his building. (4) The owner of an industrial enterprise failed

[24] R.S.F.S.R. Supreme Court, Civil Cassation Division, Letter of Instruction 1927, No. 1 (1927) Soviet Justice No. 10 at 299.

to take necessary measures to prevent damage caused to the local population by smoke, stench, fumes, noises, etc." [25]

Mr. Greaves and Professor Kelman correctly commented on these cases that they would have been similarly decided by nonsocialistic courts under the law of nuisance (in America and England), *Schikane* (in Germany), misuse or unreasonable use of rights (in France), bad faith (in Switzerland).[26]

"(5) A creditor, availing himself of the helpless situation of the debtor, consented to extend or cancel his claim in return of the debtor's promise to render some shameful or degrading services." [27]

The creditor would have been likewise checked in a nonsoviet country under the law of public policy and good morals.

"(6) The proprietor of a shop used the words 'Former foreman of X' on his sign, although he had been such foreman for a short time only and had been dismissed as incompetent." [28]

Here the act of the shopkeeper obviously violates the law against unfair competition.

"(7) A party made an illegal contract which he knew was not binding upon him, with the intention of subsequently challenging the validity of the contract." [29]

The traditional law of contract would be certainly sufficient to deny the validity of such a contract.

"(8) A debtor tried to avail himself of the fact that the contract did not clearly provide in what currency payment had to be made, and attempted to pay in depreciated currency." [30]

[25] Greaves, *op. cit. supra*, note 20, at 175. These cases are reported in Malitsky 30–31. This digest is also quoted in Stuchka, 2 Course 251 *et seq.*
[26] Greaves, *op. cit. supra*, note 20 at 177.
[27] *Id.* 175 Malitsky 30.
[28] *Ibid.;* Malitsky 31.
[29] *Ibid.;* Malitsky 30.
[30] Ukrainian Supreme Court, Civil Division, Decision No. 195, Complete

Mr. Greaves comments on this case:

". . . It may be remembered that in Germany during a similar currency crisis, paragraphs 157 and 242 of the German Civil Code, providing that contracts are to be interpreted and obligations are to be performed by the debtors in all fairness and in accordance with the existing customs (*wie Treu und Glauben mit Rücksicht auf die Verkehrsitte es erfordern*) were used to compel parties to contracts made in the depreciated currency, to distribute the loss from the depreciation more equitably." [31]

(9) It was ruled under Section 1 of the Civil Code that a sale of planted trees to be cut in an orchard contradicts the economic purpose and is not permissible. It was stressed that land belongs to the State and the holder of an orchard has merely the right of use.[32]

Under the provisions of the soviet land law, a holder of an orchard is similar to a tenant. Thus, the decision would not disturb the legal conscience of a nonsoviet lawyer.

(10) By contract, a playright granted a state organization the exclusive right of performance for a period of two years. "The court found that the provision was unenforceable as only the state had the right to create monopolies, and there was no special provision in the copyright law giving that right to the authors." [33]

This case involves the interpretation of a specific soviet statute (on copyright). From the point of view of

Collection of the Decisions of this Division (in Russian 1923) No. 2. See also Malitsky 30.

[31] Greaves, *op. cit. supra,* note 20 at 178; German Civil Code (BGB), Articles 157, 242:

157. Contracts shall be interpreted according to the requirements of good faith (*nach Treu und Glauben*), ordinary usage being taken into consideration.

242. The debtor is bound to effect the performance according to the requirements of good faith (*nach Treu und Glauben*), ordinary usage being taken into consideration. Eng. tr. by Wang, pp. 35, 55.

[32] "R.S.F.S.R. Supreme Court Circular Letter 1924 No. 24" (1924) Soviet Justice 765; Greaves, at 175.

[33] R.S.F.S.R. Supreme Court, Civil Division 1925, Decision No. 135, Case No. 32054, Collection of Decisions of the Civil Division of the R.S.F.S.R. Supreme Court (in Russian 1925) No. 2 at 272–278; Greaves, *ibid.*

a nonsoviet lawyer, the decision stands or falls, depending on the particular provisions of the copyright law referred to in the decision.

(11) "A nationalized factory was denationalized and returned to the owner. Subsequently, the factory building was seized and declared municipalized [i.e., taken over by the city] and the owner dispossessed. The lower court found against the owner on the theory that, although the factory was returned to the owner, the denationalization did not confer upon the owner immunity against municipalization. The Civil Cassation Department set this decision aside on the ground that it violated Section 1 of the code, as it would be against the social and economic policy to return only the equipment to the owner without the building wherein it was destined to be operated." [34]

This decision protected rather than limited the private right involved.

(12) "The owner of a house, during a housing crisis, permitted his rooms to remain vacant or did not use them in accordance with their intended purpose." [35]

(13) A sugar mill in a locality in which there was no housing shortage, attempted to eject school teachers, with the result that they would have been required to walk a long distance to and from the school. This was held to conflict with the interests of the teachers and the school and therefore with Section 1.[36]

Both these decisions could have been rendered in many capitalist countries under various emergency laws caused by the shortage of housing.

(14) "Unjustified raising of prices by a lessee of an enterprise was enjoined." [37]

Although, as a general rule, in capitalist countries the courts would not consider it unlawful for an owner of

[34] *Id.*, Decision No. 255, Case No. 33141; *id.*, No. 3 at 187–189. Greaves, *ibid.*

[35] Malitsky, *op. cit. supra,* note 25 at 30; Greaves, at 176.

[36] Ukrainian Supreme Court, Civil Division 1923, Decision No. 45, *op. cit. supra,* note 30, No. 1, 54–56; Greaves, *ibid.*

[37] Greaves, *ibid;* Malitsky 31.

an enterprise to raise the price of his product, ceiling prices and restriction on unreasonable advance in prices are not uncommon events during emergencies.

(15) "The proprietor of a boat did not permit a neighbor to use it in order to summon a doctor to his desperately ill wife; the court held that this neighbor was justified in taking the boat by force." [38]

Mr. Greaves comments:

". . . The American courts may not find a suitable precedent to give the husband of a sick wife the right forcibly to take a boat from an inhuman neighbor. Nominal damages might have been assessed against such "wrongdoer," but our moral sense is not offended at the decision as it stands. Furthermore, in some countries, Germany for instance [Civil Code, Article 904], the husband would be exonerated by virtue of a law specifically compelling the owner to tolerate the use of his property if necessary to avert serious damage." [39]

(16) "A co-proprietor of a motor left it unused in the yard, where it was rusting; his co-proprietor obtained judgment granting him the ownership of the whole motor subject to the payment of indemnity to the negligent co-proprietor." [40]

Mr. Greaves comments correctly that this case:

". . . Involves a question of property law, rather than the application of any novel principle of law. In other jurisdictions substantially the same remedy (dissolution of the co-proprietorship and disposition of the common property) is available to the aggrieved co-proprietor; and it must be noted that the real motive behind this remedy is not the private but the public

[38] *Ibid.*

[39] Greaves, *op. cit. supra*, note 20 at 178; German Civil Code (BGB), Article 904:

The owner of a thing is not entitled to forbid the interference of another with the thing, if the interference is necessary for averting a present danger and the threatened injury is disproportionately great in comparison with the injury caused to the owner by the interference. The owner may require compensation for the damage caused to him. Eng. tr. by Wang, p. 202.

[40] Ukrainian Supreme Court, Civil Division 1923, Decision No. 3, *op. cit. supra*, note 30, No. 1 at 5–6; Greaves, at 176.

interest which favors the preservation and best use of property." [41]

(17) "A decision of a lower court, ordering an embezzler to pay for the amount embezzled in small installments over a period of ten years, was reversed as this decision was found to be not in line with usual conditions of the economic life and therefore within Section 1." [42]

As Mr. Greaves justly remarks, this case:

". . . Involves no principle of any general policy, communist or otherwise; it was simply a case where the higher court of the republic set aside an obviously silly decision of the lower court and referred to Section 1, only to preserve the fiction that it was setting aside the decision on a point of law, and not on the merits of the case." [43]

(18) "A lessee of a lot, without good reason, did not permit another to enter upon or to pass through it, though the latter had urgent need to do so." [44]

One is bound to agree with Mr. Greaves that this case "simply refers to the emergency right of entry on, or passage through, adjoining property, a right which in one or another form has been recognized in all jurisdictions, beginning with the classic Roman Law." [45]

7. Soviet Decisions Restricting Private Rights

Against these acceptable decisions stands a less numerous category of cases where a legally acquired and lawfully held property was taken from the owner if he

[41] Greaves, *op. cit. supra*, note 20 at 179. Similar remedies are provided for the co-proprietor under Articles 620, 621, 625 of the Swiss Civil Code.

[42] R.S.F.S.R. Supreme Court, Civil Division 1926, Decision No. 113, Case No. 31366, Decisions of the Civil Division of the R.S.F.S.R. Supreme Court (in Russian 1926) No. 1 at 151; Greaves, at 176.

[43] Greaves, at 179.

[44] R.S.F.S.R. Supreme Court, Civil Division 1925, Decision No. 254, Case No. 34478, *op. cit. infra*, note 48, (1925) Judicial Practice No. 2, 186–187.

[45] Greaves, *loc. cit.*, Dig. 8, 6, 14, Section 1:

Where a highway is destroyed by the overflow of a river, or by the destruction of a building, the nearest neighbor must furnish the roadway.

French Civil Code, Articles 682 *et seq.;* German Civil Code, Article 917; Enacting Law, Section 124; Swiss Civil Code, Articles 667, 684, 695.

did not use it in accordance with governmental policy or failed to use it at all:

A mill was taken from the lawful proprietor because he did not operate it, being unwilling to pay the operation tax; lithographic machinery was taken from proprietors who did not use it. A legally acquired ownership of a tractor was declared null and void because the owner "used it for the exploitation of the populace," i.e., employed hired labor for its operation.[46] It was held that "the owner of a denationalized cattle breeding ranch must use it in accordance with its destination; otherwise it will be withdrawn from him." [47]

"Even if a mill dam floods the upstream mill, the court has the right to refuse to close the lower mill if it finds that the social economic interest of the State would be thereby affected." [48] "The owners of a storehouse left it unused for a period of nine years; the court ordered it turned over to a local mutual aid committee, for the price of the building material." [49] If the owner of an enterprise maliciously closes it to avoid the payment of a tax, the court may order such enterprise surrendered to the government.[50] "The failure of the owner of a plant to operate it at full capacity; sale by him of the equipment; closing of certain shops, were held by the Supreme Court to be sufficient grounds for applying

[46] R.S.F.S.R. Supreme Court, Civil Division, "Report for the First Half of the Year 1929." Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 1932) 33–34.

[47] R.S.F.S.R. Supreme Court, Civil Division, Decision on Case No. 31574, (1929) Judicial Practice No. 17 at 1: Greaves, at 176.

[48] *Id.*, Decision of 1925, No. 254, Case No. 34743, Decisions of the Civil Division of the R.S.F.S.R. Supreme Court (in Russian 1925) No. 3 at 186–187; Greaves, at 177.

[49] Kelman, "Controversy over Section 1 of the Civil Code" (in Russian 1927) Messenger of Soviet Justice No. 16 at 616; Greaves, *ibid.*

[50] "Instruction of the Commissar for Commerce of August 2, 1929" Section 55 (in Russian 1929) Soviet Justice No. 39 at 928.

Section 1, dispossing the owner, and turning the plant over to the State." [51]

8. Limitation of Private Rights Under Present Soviet Law

In all these cases the soviet courts have applied Section 1 so as to curtail private rights in a manner not justifiable under traditional jurisprudence. As Professor Kelman put it:

> Extralegal principles and requirements lying outside the statutory law became of legal significance. Social and economic considerations were elevated to the rank of law-creating factors.[52]

The same author correctly has remarked that, in contrast to traditional jurisprudence, Section 1 resulted in restriction of private rights, for reasons detached from good morals, and protection of equal rights of others.

And yet it is scarcely to be concluded that Section 1 became such a menace to private rights as it was expected to be. When the New Economic Policy ended and the socialization of the whole of Russian industry and commerce under the Five-Year Plan was inaugurated, the sphere of private rights was restricted indeed. But this restriction was not effected through the courts nor by extensive use of Section 1. On the contrary, recent available collections of court decisions do not contain cases invoking this section. Moreover, the Supreme Court of the R.S.F.S.R. checked an attempt, on the part of the Moscow regional court, to employ Section 1 as a universal instrument of new policy, when that court suggested, in a letter to the lower courts dated

[51] R.S.F.S.R. Supreme Court, Civil Division, Decision of 1928, Case No. 32471 (1928) Judicial Practice No. 24 at 3; Greaves, *ibid.*

[52] *Op. cit. supra*, note 20 at 315.

January 25, 1930, that the protection of law be denied to those private rights of "kulaki" and bourgeoisie which seemed to be not in line with the government policy of the day. The R.S.F.S.R. Supreme Court repealed the letter of the Moscow regional court, stating:

> The order does not correspond to the law or general policy of the government. The regional court might, if it is desired, raise the question of the amendment of the law through legislative channels, but such a simplified method of "supplementing" the applicable laws enacted by the soviet government is inadmissible.
>
> If all thirteen regional courts legislate in such a way, complete anarchy will result.[53]

Consequently, limitation of private rights under the new policy was effectuated by legislation. The real limits upon their exercise are to be found in the 1936 Constitution and in scattered pieces of legislation, not in the court reports. (These limitations are discussed at length, *infra,* II, and in Chapter 16, Property.)

It is significant that the 1944 textbook on civil law assigns a modest role to Section 1 of the Civil Code. In one instance it is referred to as a mere declaration of the following principles of soviet law:

> Egotistic individualism of capitalist civil law is foreign to soviet law, which is based upon the principle of combination of the personal interests of citizens with the growth of the public welfare. The making use, by an individual, of his private rights to the prejudice of the interests of the socialist society is contrary to the social and economic purpose of private rights. In this connection Section 1 of the Civil Code provides . . . [quoting the section].[54]

This section is mentioned also in another instance, viz., in connection with a vague term "rules of socialist

[53] Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 2d ed. 1931) 45–48, the full text—an excerpt—(3d ed. 1932) 34.

[54] 1 Civil Law (1944) 18.

community life," which is the soviet equivalent to good morals. The textbook states:

> At present the contents of Section 1 of the Civil Code must be treated in conjunction with Section 130 of the Constitution which establishes the duty of the citizens to observe labor discipline, to take an honest attitude toward public duties, and to observe the rules of socialist community life. Therefore, exercise by individual citizens of their rights contrary to the above-mentioned duties shall find no support on the part of the law and of the court which applies the law.[55]

Such interpretation reduces the role of Section 1 to mere prohibition of the abuse of private rights to the prejudice of public order and good morals.

9. Repercussions of Section 1 of the Soviet Civil Code on Recent Nonsoviet Codes

Although Section 1 of the soviet Civil Code neither became popular at home or abroad nor produced any decision of consequence in Soviet Russia, nevertheless it has left traces in the recent civil codes of other European countries. Section 1 drew the attention of foreign legislators to the necessity of a better defined clause prohibiting abuse of rights. One cannot say that the soviet example was followed, and yet the provisions hereinafter quoted undoubtedly remind one of the restrictive formula of the soviet Code. Reference is made to the following:

The Franco-Italian draft of a uniform Code of Obligations provides:

> Section 74. Likewise whoever has caused damage to another by exceeding, in exercise of his rights, the limits fixed by good morals or by the purpose for which the right was conferred upon him, shall be liable to compensate for this damage.

[55] *Id.* 36.

The Polish Code of Obligations of 1933 contains the following:

Section 135. Whoever, intentionally or by negligence, has caused, in exercise of his right, a damage to another must compensate therefor, if he exceeded the limits fixed by good morals or by the purpose for which he enjoyed the right.

Similar provisions were proposed in the draft of a new Italian Civil Code but were not included in the final text of the Italian Civil Code of 1942.[56] However, with regard to property, the Code went much further:[57]

Article 811. Property is subject to the control of the corporate regime, as regards its economic function and the requirements of national production.

Article 838. Saving the provisions of the penal and police laws, as well as the rules of the corporate regime and the particular provisions concerning specific forms of property, when an owner abandons the conservation, the cultivation, or the use of property which concerns the national production, in a manner gravely prejudicing the requirements of the said production, this property may be expropriated by the administrative authority, after payment of a just indemnity is made.

[56] Azzaritti and Martini, Diritto civile italiano secondo il nuovo codice (1940) 17.

[57] Italian Civil Code of 1942, Articles 811 and 838:

Art. 811 (*Disciplina corporativa*).

I beni sono sottoposti alla disciplina dell'ordinamento corporativo in relazione alla loro funzione economica e alle esigenze della produzione nazionale.

Art. 838 (*Espropriazione di beni che interessano la produzione nazionale o di prevalente interesse publico*).

Salve le disposizioni delle leggi penali e di polizia, nonchè le norme dell'ordinamento corporativo e le disposizioni particolari concernenti beni determinati, quando il proprietario abbandona la conservazione, la coltivazione o l'esercizio di beni che interessano la produzione nazionale, in modo da nuocere gravamente alle esigenze della produzione stessa, può farsi luogo all'espropriazione dei beni da parte dell'autorità amministrativa, premesso il pagamento di una giusta indennità.

La stessa disposizione si applica se il deperimento dei beni ha per effetto di nuocere gravemente al decoro delle città o alle ragioni dell'arte, della storia o della sanità pubblica.

After the liberation, Article 811 was repealed by the Decree of September 14, 1944, No. 287, Article 2.

The Rumanian Civil Code of 1939 also paid tribute to the same trend in the following:

Section 1. A right must be exercised in good faith in conformity with the purpose for which it was recognized.

Abusive exercise of rights shall not be protected by law.

II. Bill of Private Rights in the Civil Code

1. Original Meaning of Section 5 of the Civil Code

Certain provisions relating to the bill of private rights declared upon the inauguration of the New Economic Policy still remain on the statute books. They are contained in Section 5 of the Civil Code, which reads:

5. In accordance with the foregoing[58] every citizen of the R.S.F.S.R. and other republics of the Soviet Union has the right freely to move about and to take residence within the territory of the R.S.F.S.R., to choose any occupation and profession not forbidden by law, to acquire and alienate property within the limitations established by law, to conclude legal transactions and to incur obligations, and to organize industrial and commercial enterprises, subject to all regulations governing industrial and commercial activities and protecting employed labor.

The text of Section 5 has remained unchanged as it was originally promulgated in 1922. At that time private industry and commerce were admitted within certain limits together with the exclusive governmental ownership of certain properties (land, railways, large-scale industry, etc.) and monopolies (foreign trade, banking, insurance, et cetera).[59]

[58] Reference is made here to the provisions of Section 4, quoted *supra*, p. 315, according to which legal capacity is granted for the development of productive forces.

[59] Detailed characteristics of this period are given in Chapter 1, III.

Section 5 of the Civil Code was thus designed to contain the bill of private rights granted under the New Economic Policy to the citizens and to incorporate by reference the limitations thereon under the new Policy. So long as the Policy lasted, these limitations were embraced in the special provisions of the Code and separate laws to which Section 5 indirectly referred. Thus, Section 5 granted free choice of occupation and profession; but only from among those which are "not forbidden by law." Likewise, the right to acquire property was guaranteed "within the limitations established by law." The Code itself and the legislation of the New Economic Policy period established few such prohibitions and limitations. Section 17 of the Code closed foreign trade to private persons, unless a special license was issued by the People's Commissariat for Foreign Trade. No particular limitations were prescribed for domestic commerce. Banking and insurance, nationalized during "Militant Communism," were never reopened to private business. Acquisition of properties by private persons remained restricted by the rule that land, subsoil, forest, waters, and railways are not subject to private transactions and private ownership (Sections 21, 53). Also, certain properties, upon becoming governmental, "may not be converted into private ownership" (Section 22). These include "(a) industrial, transportation, and other enterprises taken as a whole; (b) industrial establishments, factories, plants, mines, et cetera; (c) equipment of industrial establishments"; and other objects enumerated in Section 22. Some of these government properties, such as industrial establishments employing a large number of workers, and telegraph and radiograph services might have been owned by private persons "by concession granted by the government" under Section

55. Finally, the properties enumerated in Sections 23 and 56 could be held by special permit of the authorities, but trading in them was prohibited; these include arms, certain precious metals, aircraft, et cetera. Trade in some metals and in foreign currency was reserved for special regulation (Section 24). Of these, a governmental monopoly was established, which at the present time is regulated by the Law of 1937.[60]

Objects left to private ownership in particular were enumerated in Section 54.

2. Subsequent Indirect Amendments

The New Economic Policy came to an end with the First Five-Year Plan (1929–1933), which was designed among other things "to exterminate capitalist forms of economy and . . . to create such an industry as would be able to re-equip the whole economy on a socialist basis."[61] In accordance with this aim, several laws and decrees were issued, making some of the provisions of Section 5 inoperative, although they remained unchanged on the statute books (see *infra*, 4). Editions of the Civil Code published by the Commissariat for Justice, leading writers, and recognized textbooks indicate such indirect amendments to the Code and those to Section 5 in particular.[62] The general outline of the present social order as given in the 1936 Constitution implies further limitation of rights granted under Section 5 of the Civil Code. As the recent soviet textbook

[60] U.S.S.R. Laws 1937, text 25, quoted in Volume II, comment to Section 24 of the Civil Code.

[61] Stalin, "Address at the Central Committee of the Communist Party on January 7, 1933" Problems of Communism (in Russian 10th ed. 1935) 485.

[62] Gintsburg, Problems of the Soviet Economic Law (in Russian 1933); 1 Civil Law Textbook (in Russian 1938) 49, 64, 239; Civil Code (1943) 130, 158, 163; Zimeleva, Civil Law (1945) 41, 60, 85 *et seq.*; 1 Civil Law (1944) 124; Civil Code (1948) 128, 147–152.

on civil law has stated: "Section 5 of the Civil Code needs to be co-ordinated with Sections 4, 7, 9, 10, 12 and Chapter X of Stalin's (1936) Constitution." [63]

3. Provisions of the 1936 Constitution Affecting Section 5

Section 4. The economic foundation of the U.S.S.R. consists in the socialist system of economy and socialist ownership of the instruments and means of production, firmly established as a result of the liquidation of the capitalist system of economy, the abolition of private ownership of the instruments and means of production, and the abolition of the exploitation of man by man. . . .

Section 6. The land, subsoil, waters, forests, mills, factories, mines, railway, water and air transport, banks, means of communication, large agricultural enterprises organized by the government (government farms, machine and tractor stations, and the like) as well as public utilities and the essential part of the housing in cities and industrial centers, shall be under governmental ownership, that is to say, in the domain of all the people.

Section 7. . . . Each household belonging to a collective farm shall have, in addition to the basic income derived from the joint farming of the entire collective farm, a small house-and-garden plot of land for the use of the household and, in personal ownership, the auxiliary husbandry on such plot, a dwelling house, livestock other than draught animals, poultry, and minor agricultural implements in accordance with the Charter of the Agricultural Artel (collective farm). . . .

Section 9. Alongside the socialist system of economy, which is the dominant form of economy in the U. S. S. R., the law shall allow small private husbandry of farmers who are not members of collective farms and of handicraftsmen, based on personal labor and excluding exploitation of the labor of others.

Section 10. The law shall protect the right of personal ownership by citizens of their earned income[64] and their savings, dwellings and auxiliary household economy, household effects and utensils,[65] objects of personal consumption[66] and comfort,

[63] 1 Civil Law (1938) 64.
[64] *Trudovoy dokhod*—this is a better translation than "income from work."
[65] *Predmety domashnego khoziaistva i obikhoda.*

as well as the right of succession in personal ownership of citizens.

In view of these constitutional provisions, the private rights enumerated in Section 5 of the Civil Code appear to be limited in the following manner. "Socialist ownership of the instruments and means of production" and "abolition of private ownership" of such instruments and means (Section 4) bars private industry. Section 6 contains a wider enumeration of properties reserved for exclusive governmental ownership than was given by the Civil Code. In addition to "land, subsoil, waters, forest, railways and their rolling stock," Section 6 of the Constitution subjects to governmental ownership all "mills, factories, mines, railways, water and air transport, banks, means of communication, large agricultural enterprises organized by the government . . . public utilities, and the essential part of housing in the cities and industrial centers."

Private industry is admitted only in the form of small-scale handicraft and farming conducted by personal labor of the owner without the use of hired labor (Section 9). Specific rules set up for handicraftsmen and artisans are dealt with *infra*, 4. Finally, Section 10 offers limited legal protection to private ownership. Such protection is not promised to "private" ownership but to "personal" ownership, and again it is extended only to the personal ownership in specifically enumerated objects such as "earned income and savings, dwellings, auxiliary household economy, household effects and utensils, objects of personal consumption and comfort." "Personal ownership" used here is a new term, and its concept must be deduced from this enumeration in con-

[68] *Potreblenie.* The usual translation "of personal use" is wrong. *Potreblenie* means "consumption" and not "use" (*pol'sovanie, upotreblenie*).

junction with the general principle stated in Section 4, viz.: "The economic foundation of the U.S.S.R. consists in socialist ownership of instruments and means of production" and "in the abolition of private ownership" of such instruments and means. In view of these provisions, the wording of Section 10 suggests that the legislator intended to reduce the protection by law to private ownership in commodities for consumption only. Under these provisions productive investment is barred. The narrow concept of protected "personal ownership," as distinguished from "private ownership," was originally drawn by the prominent soviet legal writer, Goikhbarg, the compiler of the Civil Code of 1922.[67] The concept is accepted by the recent textbooks on civil law (1938, 1944, and 1945). The 1938 textbook states as follows:

> There is no longer any capitalist private ownership in the U.S.S.R. Governmental socialist ownership is the predominant form of ownership in the U.S.S.R. . . . In a socialist society, the socialist ownership of the instruments and means of production is combined with personal ownership by citizens of the objects of consumption. . . . Only that part of the sum total of the common production which is destined to serve as a means of consumption shall be distributed individually among the toilers according to the quantity and quality of their labor.[68]

[67] Goikhbarg, "Personal Ownership Under Socialism" (in Russian 1937) Soviet Justice No. 10/11, 22 *passim*. The most extensive elaboration of this principle was recently given by Venediktov, the "Right of Governmental Socialist Ownership" (in Russian 1945) 1 Problems of the Soviet Civil Law 74 *et seq.*

[68] 1 Civil Law Textbook (1938) 163, 166, 229. Zimeleva, *op. cit.*, note 62 at 41, 60. 1 Civil Law (1944) 276 contains a more accurate statement:

> In comparison with governmental ownership and that of co-operatives and collective farms, private ownership appears to be more limited with regard to its objects. Articles of personal consumption constitute the objects of personal ownership of citizens, but along with such articles some minor instruments of production constitute the objects of the ownership of a household in a collective farm, but these must be used by personal labor of the members of the household only and may not become a means of exploitation of the labor of another.

This problem is discussed at length in Chapter 16, Property.

4. Individual Laws and Decrees Affecting Section 5

In addition to the general limitations on private rights implied in the Constitution, specific modifications of rights enumerated in Section 5 are to be found in individual laws.

(a) The right to *select residence* was affected by the passport system introduced on December 27, 1932. Under this law, and subsequent ordinances, residence in a number of cities and industrial centers requires a permit from the police authorities, who can exercise a rather wide discretion in issuing such permits.[69]

(b) *Selection of occupation* is limited by the prohibition of private commerce and industry and by the very narrow limits within which the activities of artisans are admitted (see *infra*).

(c) General limitations on the *rights to acquire properties* implied in the Civil Code are indicated above under 1, and further general limitations under the Constitution are stated under 3. The laws concerning collective farms established special restrictions upon the right of acquisition of certain properties by the members of collective farms. Under the Standard Charter of an Agricultural Artel of 1935, the basic law concerning farms,[70] certain properties incidental to farming may only be collectively owned by the collective farm as a unit. Here belong:

This problem is discussed at length in Chapter 16.

[69] U.S.S.R. Laws 1932, texts 516, 517 and the Instructions to these laws, *id.* 1933, texts 22, 168. On September 10, 1940, all these regulations were replaced by the statute concerning passports, U.S.S.R. Laws 1940, text 591. Evtikhiev and Vlasov, Administrative Law (in Russian 1946) 215.

[70] U.S.S.R. Laws 1935, text 82, Section 4. See also Chapter 20. For a full translation see Vol. II, No. 30.

. . . All draught animals, agricultural implements (plough, sowing machine, harrow, threshing machine, mowing machine, et cetera) reserves of seeds, forage to the extent necessary for the collectively owned livestock, buildings needed for the collective farming, and all establishments processing agricultural products.

Thus only "dwellings, personal cattle and poultry, as well as buildings necessary for keeping the cattle," and "minor implements needed for tilling the house-and-garden plots are left to the individual households of a collective farm."

In the main agricultural regions, no more than one cow, two calves, one or two pigs, ten sheep or goats, twenty beehives and an unlimited quantity of poultry, but no horses, are allowed to each household. A larger quantity is allowed in the regions of animal husbandry, especially in the nomadic and semi-nomadic regions of Asiatic Russia.[71]

It is generally accepted that the collective farmer has no right to acquire and possess any such property as must be collectively owned under the charter of the collective farm to which he belongs, e.g., to acquire a horse in an agricultural region. "While the peasant stays in a collective farm he cannot have in his private ownership objects which may restore individual farming (a horse or a plough)."[72] Similar restrictions are placed upon acquisition of livestock by the workers employed on the governmental farms.[73]

(d) The clause of Section 5 granting the *right to organize industrial and commercial enterprises* to private persons is, according to the recent textbook, "out-of-

[71] *Id.*, Section 5.
[72] Komarov, "Objects of the Ownership of Collective Farms" (in Russian 1938) Soviet Justice No. 23/24, 30; Law of Collective Farms (in Russian 1940) 40.
[73] U.S.S.R. Laws 1938, text 268.

date"; it reflects the policy of the New Economic Policy period when private commerce, and to an extent private industry, were admitted.[74] Even though private *industrial* establishments could have been opened "under observance of all regulations governing industrial activities," Section 54 of the Code stated that only such "industrial establishments as employ workers in a number not to exceed that established by special law" may be privately owned. It was held in the practice of that time, that an earlier Decree of July 7, 1921,[75] permitting the opening of private establishments employing not more than twenty workers, retained its effect under the Civil Code. Employment of a higher number required a concession from the government under Section 55 of the Code. These provisions became totally inoperative in view of the provisions of Section 4 of the 1936 Constitution declaring "abolition of private ownership of means of production."

(e) *Private commerce,* which was not restricted under the Civil Code, was barred by the Law of May 20, 1932, which ordained that the "opening of shops or stands by private merchants shall not be permitted and by all means the middlemen and speculators who try to make profit at the expense of workers and peasants must be eliminated."[76] Under Section 107 of the Criminal Code, as amended by the Law of November 10, 1932 (August 22, 1932), "the buying up or reselling for profit (speculation) of agricultural products or commodity staples" is punishable by a term in jail or in a concen-

[74] 1 Civil Law Textbook (1938) 64; 1 Civil Law (1944) 124.
Constitutions of Latvia, Estonia and Lithuania carry provisions (Section 8) similar to those of Section 5 of the Civil Code in contrast to the provisions of the U.S.S.R. Constitution of 1938 quoted *supra*. See Chapter 16, note 20.

[75] R.S.F.S.R. Laws 1921, text 323.

[76] U.S.S.R. Laws 1932, text 233.

tration camp for a period of not less than five years, and complete or partial confiscation of property.[77] The new policy of the so-called "soviet commerce" is in Stalin's words "a commerce without capitalists, big or small." According to him, the soviets "eliminated the private traders, merchants, and middlemen of any kind. There may appear, by virtue of the laws of atavism, private traders who will use the commerce of collective farms. Moreover, the collective farmers themselves don't mind speculating, but against these unsound phenomena we have a recently enacted criminal law." [78]

Contrary to the practice of the period of Militant Communism (1918–1921), when any sale, even by the producers, was prohibited, the collective and individual farms are permitted to sell their products directly to the consumer on the market place or to the government. "Sale by collective farms, collective farmers, and independent farmers may be made according to the market prices, while sale by a union of collective farms may be made according to prices not to exceed the average commercial prices in the governmental commerce." [79] However, any buying for the purpose of reselling the goods with profit, no matter how reasonable it may be, is prohibited and punishable under Section 107 of the Criminal Code quoted above. "The mere fact of buying up of goods is sufficient for the punishment for speculation, if the purchaser has the intention of reselling at a higher price the goods purchased." [80]

[77] Federal Law of August 22, 1932, U.S.S.R. Laws 1932, text 375, R.S.F.S.R. Laws 1932, text 385; Izvestiia, December 3, 1932, No. 335.

[78] Stalin, "Speech of January 7, 1933" Problems of Leninism (in Russian 10th ed. 1935) 505. Stalin's statement concerning the "recently enacted criminal law" refers to Section 107 of the Criminal Code as amended by the law noted *supra*, note 77.

[79] U.S.S.R. Laws 1932, text 233; *id.* 1933, texts 25, 396.

[80] R.S.F.S.R. Criminal Code, annotated by Trainin, Menshagin, and Vy-

(f) The legal status of the *small-scale private business* admitted by Section 9 of the Constitution is rather uncertain under the soviet law. The economic position of such trades rather than their legal status is described in the soviet textbook of 1938 on civil law as follows: "Small-scale private business admitted by Section 9 of the Constitution is basically different from such business under capitalism. It is also different from such business under the New Economic Policy. The small-scale private business of a socialist society is deprived of the possibility to produce capitalism." [81] It is defined as a remnant of an outlived form of economy. However, the question whether ownership incidental to such business is "private ownership" under Section 54 of the Civil Code, or whether it is "personal ownership" under Section 10 of the Constitution, has not been answered. The textbook of 1945, without expressly identifying the permitted small-scale business with "personal ownership," defines its status as follows:

> Citizens conducting small-scale private business may own minor instruments of production provided they do not employ hired labor. Such property may be alienated and inherited like their other property and, in general, is regulated by the legal regime governing property held in personal ownership.[82]

The textbook of 1944 states that to such property "the provision concerning personal ownership shall apply insofar as no special rules for this property are established

shinkaia, edited by Goliakov, President of the Supreme Court (in Russian 1941) 134. U.S.S.R. Supreme Court, Plenary Session, Ruling of February 10, 1940, Criminal Law, Special Part (in Russian 3d ed. 1943) 350.

For instances of recent severe application of this Section, see 2 Judicial Practice of the U.S.S.R. Supreme Court in 1942 (in Russian 1943) 12 *et seq*.

[81] 1 Civil Law Textbook (1938) 238.

[82] Zimeleva, Civil Law (1945) 90.

by law." [83] As regards such special rules the textbook refers to the Act of April 19, 1938,[84] on especially heavy taxation of independent farmers, the Law of August 21, 1938, imposing a special tax on horses of farmers who are not members of a collective farm,[85] and the provisions of the Law of August 31, 1939, on agricultural tax.[86]

Regarding the limits prescribed for small-scale business other than farming, all the recent sources [87] still refer to the "Order of the Federal People's Commissariat for Finance concerning the registration of handicraft and artisan trades" approved by the Council of People's Commissars on March 26, 1936.[88] It should be considered as the statute governing small trades in the Soviet Union. Under this order, a license from the local tax authorities is required for the exercise of any small trade (Section 1). Licenses are issued for only one year and must be renewed annually (Sections 1 and 12). Exercise of trade without license or in excess of license entails fines up to 500 rubles imposed by the tax authorities and, in addition, must be reported to the district prosecuting attorney for prosecution under the criminal law (Sections 17–20). Trade must be exercised without employment of hired labor, and for a number of trades no license may be issued, which is to say that such trades are prohibited. The following are the salient provisions of the order:

1. Persons who are engaged, without the employment of hired labor, in handicrafts and artisan trades, in the carrier's

[83] 1 Civil Law (1944) 280.
[84] U.S.S.R. Laws 1938, text 117.
[85] Vedomosti 1938, No. 11.
[86] Vedomosti 1939, No. 32.
[87] Civil Code (1943) 158; Zimeleva, Civil Law (1945) 89; 1 Civil Law (1944) 126, 281; Civil Code (1948) 128, 148.
[88] (1936) Financial and Economic Legislation No. 11, 17.

trade, in personal services, and services satisfying everyday household needs of the population (such as carpenters, cabinetmakers, painters, chimney builders, roofmakers, plumbers, mechanics, electricians, glaziers, chimneysweepers, floorpolishers, upholsterers, watercarriers, laundresses, porters, bookbinders, barbers, photographers, opticians), must obtain annually from the county taxation office, before the beginning of the year (or before the beginning of the trade if it starts in the middle of the year), licenses (registration certificates) for the exercise of their trade. . . .

Trades the exercise of which is prohibited:

3. The following trades are prohibited and no license may be issued for their exercise:

(a) Processing of purchased grain, hemp, and wool including flaxen and woolen yarn (except when these are given for mere processing and except for carpet weaving);

(b) Processing of any kind of tobacco, oil-producing seed, of raw cotton and spun cotton, cocoons (silk) and spun silk, leather and sheep pelts in the raw state, purchased or obtained for the purpose of processing;

(c) Manufacturing of acids, lacquers, paints, linseed oil, vitriol, sodium, bluing for washing, poisonous stuffs, as well as perfumeries, cosmetics, and soap;

(d) Manufacturing of explosives and incendiary materials, including pyrotechnical products;

(e) Polygraphic trades (typography, mimeography, etc.), manufacturing of multiplying apparatus (glassograph, mimeograph, etc.), of stamps and seals;

(f) Manufacturing from one's own material for sale on the market of ready-made clothes, underwear, knit goods, hats, leather footwear, haberdashery (including leather articles), harnesses and similar leather goods, as well as articles made of nonferrous metals;

Note: It is not prohibited to issue licenses for the manufacturing of the goods enumerated in subsection "f" from the craftsmen's own material on individual customer's orders.

Issuance of licenses for the manufacturing of goods other than those indicated in the subsections (e. g., furniture, barrels, wooden utensils, baskets, straw articles, ceramics, musical instruments, etc.) is not prohibited.

(g) Any manufacturing for sale on the market and not by order of a customer, done by members of co-operative asso-

ciations of traders and of co-operatives of invalids, who work on the side, as well as by workers and clerical employees engaging in trade in extra time;

(h) Preparing of food from purchased products, such as bread and other bakery products, candies, dairy products, delicatessen, fruit and vegetable articles, meals, coffee, pepper, mustard, vinegar, wine, alcoholic and soft drinks, et cetera;

A license for the manufacturing of some of these articles may be issued in such districts as is permitted by a special resolution of the council of people's commissars of the constituent and autonomous republics and regional and provincial executive committees.

Note: It is not prohibited to issue licenses for the manufacturing of *pastila*, hard candies, poppy cookies, and *kvas*.

(i) Any trades employing hired labor . . . ;[89]

(j) Trimming, grinding, pouring into smaller vessels, sorting, cutting, rectifying, and similar storage operations (nonproductive operations) on purchased goods made for the purpose of resale thereof;

(k) Any kind of private commerce (buying up and reselling), commercial brokerage (traveling salesmen) except the selling by shoe polishers of small articles for footwear (laces, soles, shoe polish, et cetera);

Note: The sale of products of one's own farming, in raw materials or processed by members and nonmembers of collective farms as well as by workers, clerical employees, and other toilers, who are engaged in farming as a side line, and sale on railway stations and piers of agricultural products by members of collective farms and local toiling populace from stands, bars, trays, and from hand to hand, which was permitted under the Resolution of the U.S.S.R. Council of Commissars of August 2, 1935, No. 1673, shall be conducted freely without license.

(l) Maintaining of hotels, caroussels (fairs), bathing establishments, market scales, shooting ranges, and organization of various games.

5. . . . On the ground of the license obtained, the handicraftsman may sell his products (if sale is permitted) within the county or city of his permanent residence, in adjacent districts,

[89] The concluding proviso of this subsection was omitted as inoperative under the 1936 Constitution. Civil Code (1943) 158.

in the capital city of the province (region) and at fairs in the same province.

Products of the holder of a license may be sold by himself and by members of his family.

Chapter 10

Rights of Aliens and Foreign Corporations

1. Preliminary

Section 8 of the Enacting Law is the only section of the soviet Civil Code dealing with the rights of aliens. The text of the section itself concerns individual aliens, whereas Notes 1 and 2 deal with foreign corporations:

8. The rights of citizens of foreign countries with which the R.S.F.S.R. has entered into agreements of one kind or another, shall be regulated by such agreements.

Insofar as the rights of aliens are not provided for by agreements with the governments concerned or by special laws, the rights of aliens to move freely about within the territory of the R.S.F.S.R., to choose occupations, to open and to acquire commercial and industrial enterprises and rights in rem in buildings or in plots of land, may be restricted by order of the proper central organs of the government of the R.S.F.S.R., made in agreement with the People's Commissariat for Foreign Affairs (As amended November 23, 1922, *Izvestiia* No. 269, November 28, 1922).

Note 1. Foreign stock companies, partnerships, et cetera, shall acquire rights of legal entities in the R.S.F.S.R. only by special grant from the government.

Note 2. Foreign legal entities that are not authorized to conduct business in the R.S.F.S.R. shall enjoy, in the R.S.F.S.R. courts, the right to sue defendants residing within the R.S.F.S.R. on claims arising outside the territory of the R.S.F.S.R., but only on the basis of reciprocity.

The first soviet federal Constitution of 1923 assigned to the federal jurisdiction "the fundamental legislation in the province of federal citizenship and with regard to the rights of aliens" (Section 1, subsection *w*). But

the 1936 Constitution, now in force, stated in broader terms that "the jurisdiction of the Union covers . . . laws governing citizenship in the Union, laws governing the rights of aliens" (Section 14, subsection *v*). Thus, while the 1923 clause, confining the federal jurisdiction to "fundamental legislation," admitted a possibility of state legislation concerning the rights of aliens, the new clause seems to have established an exclusive federal jurisdiction in this matter. However, no comprehensive federal act determining the rights of aliens has been passed thus far (July, 1947). Instead, there are only scattered casual provisions dealing with certain rights of aliens.

In view of the foregoing, Section 8 of the Law Enacting the R.S.F.S.R. Civil Code, containing provisions uniform with all other soviet civil codes (Section 9 in the Byelorussian Civil Code), is generally accepted as establishing the "fundamental principle for the determination of private rights of aliens" in the whole of the Soviet Union.[1]

The provisions in this section are, however, far from adequate. Therefore, separate scattered provisions of individual federal statutes must be considered. Moreover, for a general clarification, the two comprehensive "Statutes on Aliens" enacted in the Ukrainian and in the Byelorussian soviet republics in 1922 should be consulted.[2] Although, in view of the provisions of the 1923

[1] 1 Civil Law Textbook (1938) 75; Egoriev and others, Legislation and International Treatises of the U.S.S.R. and Constituent Republics on Legal Status of Aliens (in Russian 1926, hereinafter cited as Egoriev) 269; Peretersky and Krylov, Private International Law Textbook (in Russian 1940, hereinafter cited as Peretersky and Krylov) 68–69; Makarov, Précis de droit international privé d'après la législation et la doctrine Russes (1932, hereinafter cited as Makarov, Précis) 175.

[2] Ukrainian Laws 1922, text 237; Byelorussian Laws 1922, text 148.

[Soviet Law]

and 1936 federal Constitutions and the soviet Nationality Statute of 1938, these statutes are for the most part inoperative, they express certain principles set forth by soviet jurists and referred to by them.[3] Moreover, certain international conventions concluded by Soviet Russia with individual countries contain clauses applicable to nationals of other countries, because for the most part these conventions contain the most favored nation clause. Finally, the practice of soviet authorities and of the Commissariat for Foreign Affairs in particular, as well as the doctrines advanced by the soviet jurists and nonsoviet scholars of soviet law, must also be considered in discussing the rights of aliens in the Soviet Union.

This material does not answer all the questions, nor is there always consistency in the application of a supposed principle. Authors often disagree. Regulation of private rights of aliens in the Soviet Union is to a large extent a matter of ever-changing policy and administration rather than of soviet legislation. The soviet solutions of problems of conflict of laws do not always correspond to concepts established by the doctrine and practice of other countries. International agreements should be considered the principal method for determining the protection of the rights of foreigners. In view of the foregoing, no attempt is made at generalization or extension of principles beyond the instances in which they have been applied.

2. Individual Aliens: Who Is an Alien Under the Soviet Law?

An essential change in the criterion of nationality was

[3] Peretersky and Krylov 70, note 1.

introduced by the new soviet Nationality Statute of 1938. Under the previous laws since 1924:

> Each person to be found on the territory of the Union of the U.S.S.R. shall be considered a soviet national insofar as such person does not prove that he is a national of a foreign country.[4]

Thus, each resident of the Soviet Union was presumed to be a soviet national, and the burden of proving the contrary was upon him. This presumption was abolished by the new law. The following persons are at present considered soviet nationals:

> (a) All persons who on November 7, 1917, were citizens of the Russian Empire and who have not lost their soviet nationality;
> (b) Persons who have acquired soviet nationality in a manner established by law.[5]

Furthermore:

> Persons residing within the territory of the Soviet Union, who under the provisions of the present law are not nationals of the U.S.S.R., [i.e., did not definitely acquire soviet nationality "in a manner established by law"] and who possess no proof of alien nationality, shall be considered persons without nationality [stateless].[6]

In short, there is no longer automatic naturalization of aliens.

Previous law made a distinction between aliens

[4] Nationality Statute of October 29, 1924, U.S.S.R. Laws 1924, text 202, Section 3. The same section in the later Statute of April 22, 1931 (*id.* 1931, texts 195, 196) reads:

3. Every person in the territory of the U.S.S.R. is recognized as a national of the U.S.S.R. insofar as there is no proof of his being a national of another foreign country.

For complete English translation and discussion of these statutes, see Taracouzio, The Soviet Union and International Law (1935).

[5] Soviet Nationality Law of August 19, 1938, Section 2 (Vedomosti 1938, No. 11). A translation is given *infra*, Vol. II, No. 4. For discussion see Taracouzio (1939) 33 Am. Jour. of Int. L. 153.

[6] *Id.*, Section 8.

classed as toilers and all others. For the former, a more favorable procedure of naturalization was open, and, while still remaining aliens, they enjoyed "all political rights," including the right to vote.[7] This discrimination has also been abandoned. Under the 1936 Constitution, only soviet citizens enjoy the franchise. A uniform and somewhat more difficult procedure for the naturalization of any alien "regardless of his nationality and race" is established by the law of 1938. Social standing is not mentioned.[8]

Postwar legislation contains several indirect amendments of the provisions of the Nationality Statute. Former Russian subjects who are considered as having lost soviet nationality, that is to say, Russian refugees residing in certain foreign countries, Manchuria, China, Japan, Yugoslavia, Bulgaria, Czechoslovakia, France, and Belgium, were offered specially favorable conditions for becoming soviet nationals almost automatically upon declaration filed within a certain period of time with soviet Russian consuls. Translations of these enactments are printed in Volume II, No. 11. Moreover, the incorporation into the Soviet Union of Latvia, Estonia, Lithuania, and certain provinces of Poland and Rumania, occasioned special regulation of the nationality of nationals and residents of these territories. A translation of the enactments issued in this connection, as printed in the soviet official publications is given in Volume II, Nos. 7–8, 10. Special regulations were issued regarding Armenians returning to the Soviet Union.

[7] R.S.F.S.R. Constitution 1918, Section 64, Note 2; *id.* 1925, Section 68, Note; Nationality Statute of 1924, Section 6; *id.* 1931:

6. Foreign nationals who are workers and peasants and reside in the U.S.S.R. fo rthe purpose of laboring therein, enjoy all political rights [accorded] to the U.S.S.R. nationals.

[8] *Lex cit.*, note 5, Section 3.

3. Domicile of Individual Aliens

It seems that a person's domicile, as distinguished from his nationality and mere residence, has, at present, no particular significance in respect to the rights of aliens in the Soviet Union. A decree, enacted on September 3, 1926, and amended on March 11, 1931, is still on the statute books, dividing all aliens into those who are temporarily staying in the Soviet Union and those who have a domicile ("permanent residence").[9] However, recent soviet writers think that "the soviet legislation does not establish any particular difference between the civil status of the two groups."[10] This is true so far as present legislation is concerned, but it seems that a distinction was made during the period of the New Economic Policy, when private business was more or less open to soviet citizens. At least, a ruling issued during that period by the R.S.F.S.R. Commissariat for Justice on June 25, 1924 (No. 800), admitted domiciled aliens (aliens having permanent residence in Soviet Russia, as the ruling called them) to any private business open to soviet citizens, while all other aliens had to ob-

[9] Resolution of the Central Committee and the Council of People's Commissars of September 3, 1926, Concerning Aliens Who Are Temporarily Staying or Permanently Residing in the U.S.S.R.

1. Aliens to be found on the territory of the U.S.S.R. are divided into two categories:

(a) Those who are temporarily staying there;

(b) Those who have a permanent residence in the U.S.S.R.

2. Persons possessing foreign nationality, who legally reside in the U.S.S.R. not less than 18 months and are engaged within the territory of the U.S.S.R. in industry, commerce, handicraft, or in any similar occupation not forbidden by law, shall be recognized as aliens having permanent residence (domiciled aliens).

Note: This section shall not apply to nationals of countries where the nationals of the U.S.S.R. are not recognized as domiciled in spite of their residence during the period required by the legislation of such countries.

3. All aliens found in the territory of the U.S.S.R., who do not satisfy the requirements set forth in Section 2 of this resolution, shall be considered as temporarily resident.

(U.S.S.R. Laws 1926, text 439.)

[10] Peretersky and Krylov 68, note.

tain a special concession permitting them to open an industrial or commercial enterprise (see *infra*).[11] Except for this ruling, which apparently has lost its significance under the present policy, since this policy as a rule excludes a private business (see Chapters 3, 9, II, and 16), soviet sources mention residence and not domicile in determining the rights of aliens. Either the soviet law, as the law of residence, or the national law of the alien applies.

Section 11 of the Civil Code contains a definition of domicile, but it obviously refers to the application of soviet law, and not to the determination of the status of aliens.

4. Legal Capacity of Individual Aliens

The provisions of Section 8 of the Enacting Law (quoted *supra* 1) are far from adequate. The only clear provision to be found is in the first paragraph of the section, viz., if a country has an agreement of one kind or another with the Soviet Union (treaty, convention, executive agreement, exchange of notes), the rights of the nationals of such country are determined by the provisions of the agreement. But no direct answer is given to the question what is the status of the same nationals with regard to rights not covered by the agreement, or of nationals of countries that have no agreement with the Soviet Union. Paragraph two of this section merely enumerates those rights which may be restricted by an order of soviet authorities in the absence of a special law or an international agreement. The enumeration affects quite a number of important rights; consequently, Freund, a German scholar, concluded in 1924 that an

[11] Nakhimson, Commentary 6.

alien not protected by an international convention is practically without rights (*rechtslos*).[12]

Soviet jurists and some nonsoviet writers have reached just the opposite conclusion. They conclude that, since paragraph two provides for the possibility of an administrative limitation of certain rights, it is to be inferred that, in the absence of such limitation these rights are enjoyed by aliens. Section 8 of the Enacting Law must be interpreted in conjunction with Section 5 of the Civil Code, which recites the rights accorded to soviet citizens. Section 8, in stating that some of these rights may be withdrawn from aliens, thereby recognized their equal rights with soviet nationals.[13] In support of their opinion, the writers refer to the provisions of the Statutes on Aliens enacted in Byelorussia and the Ukraine in 1922 (the latter was repromulgated in 1926), which stated the general principle of equality

[12] Freund, Zivilrecht Sowjetrusslands (1924) 109.

[13] *Op. cit. supra*, note 1; also Plotkin, Legal Status of Foreigners in the U.S.S.R. (1934).

The latest available officially announced regulation on sojourn of aliens was printed in Izvestiia, December 31, 1935, as follows:

The Council of People's Commissars of the U.S.S.R. has established new rules concerning the sojourn and moving about of aliens in the territory of the U.S.S.R.

According to these rules, an alien may reside in the U.S.S.R. if he has a permit for sojourn, which he shall obtain from the local police office (*militsia*) within twenty-four hours after arrival at the first place of residence selected by him.

Each time the alien changes his residence he must inform the management of the hotel or the house management of the newly selected place of abode which shall be recorded on his permit of sojourn.

Within twenty-four hours after arrival at the selected place, the alien must present his permit for sojourn for recording and registration.

If the alien arrives at a place not indicated in his permit of sojourn, the agencies of the Commissariat for the Interior may prohibit him from staying in such locality.

The newly established rules do not restrict the locomotion of aliens in U.S.S.R. territory except for special localities for the entrance and sojourn in which a permit by the Commissariat for the Interior is required.

Aliens who have resided in the U.S.S.R. from their birth or who arrived before 1914, are exempt from the obligation to announce in advance change of their residence.

This rule does not apply to alien tourists.

of aliens with nationals.[14] However, against this legislation (which is obsolete in view of the 1936 Constitution), stands the fact that some recent soviet statutes prohibit aliens from the exercise of certain private rights, including the right to marry soviet citizens, and others provide for a possibility of further restrictions by an administrative action. In view of these restrictions, it is hardly justified to conclude that the soviet law follows the principle that aliens enjoy the same private rights as soviet citizens. Before reaching a final conclusion these restrictions must be analyzed.

5. Statutory Restrictions on the Rights of Aliens

The most important restriction was enacted on February 15, 1947, by the edict prohibiting marriages between aliens and soviet citizens.[15] This restriction works both ways: it curtails the right of a soviet citizen to select a life companion, and it limits the legal capacity of an alien. Prior to that, several special laws excluded aliens from certain occupations. Thus, the Mining Code of 1927 as a rule prohibits mining to aliens, but Section 6 provides for licenses to be issued in individual cases;[16] the Code of Fisheries of 1925 prohibits foreigners from fishing, including seal fishing and hunting of sea animals;[17] the Code of Maritime Navigation of 1929 requires soviet citizenship for captains and ship mechan-

[14] Aliens within the boundaries of the Ukrainian [Byelorussian] Soviet Republic, being subject equally with Ukrainian [Byelorussian] nationals to the laws and authorities of the said republic, have the same rights as Ukrainian nationals, unless otherwise provided in this statute. Ukrainian Laws 1922, text 237, Section 4; Byelorussian Laws 1922, text 148, Section 17; Egoriev 273.

[15] Vedomosti 1947, No. 10. By the Edict of April 2, 1947, Vedomosti 1947, No. 13, the Code of Marriage, Etc. was amended. See Vol. II, No. 3, Sections 6[1], 8, 136.

[16] U.S.S.R. Laws 1927, text 688.

[17] *Id.* 1925, text 440.

ics;[18] the Air Code of 1935 requires soviet citizenship for the crews of civil aircraft.[19]

Moreover, in some instances, the soviet government has restricted the private rights of nationals of some countries as a means of reprisal against acts of foreign governments that were considered unfriendly by the soviets or applied discriminatory measures to soviet nationals. For instance, on June 20, 1923, the rights of Swiss citizens were restricted after a Swiss court acquitted the assassin of the soviet representative, Vorovsky.[20] A general rule relating to discriminations against soviet citizens was enacted by the Resolution of the Council of Commissars of November 26, 1937. It reads:

> Houses and other buildings situated in the territory of the Soviet Union and belonging, by virtue of rights of ownership or building tenancy, to aliens who are not residents in the Soviet Union and are nationals of countries which do not recognize the rights of ownership of soviet citizens, nonresidents of those countries, on property situated in those countries, shall be transferred to the local soviets of the place where such properties are located. A list of the countries whose nationals come under this provision shall be established by the People's Commissariats for Justice and for Foreign Affairs.[21]

By an Instruction of the Commissariat for Justice of December 21, 1937 (No. 147), this act was applied to Polish nationals.[22]

A general limitation must be added to these specific restrictions. The limitation refers to the "right to open

18 *Id.* 1929, text 366, Section 53.
19 *Id.* 1935, text 359*a* Section 18.
20 R.S.F.S.R. Laws 1923, text 563; Egoriev 274.
21 U.S.S.R. Laws 1937, text 368; Peretersky and Krylov 56. See also U.S.S.R. Laws 1939, text 403, giving wide authority to the Commissariat for Foreign Trade to restrict export to countries where foreign trade with the Soviet Union is subject to limitations.
22 1 Civil Law Textbook (1938) 76.

and acquire" commercial and industrial enterprises, in short, to engage in private business. At the time when, under the New Economic Policy, private commerce in general, and private industry to a limited extent, were open to soviet citizens, an alien entrepreneur, like a foreign corporation, needed a license.[23] Under the Law of April 12, 1923, "foreign firms are admitted to commercial operations" in the Soviet Union only by concession.[24] The instruction issued in execution of this law, on May 12, 1923, made it clear that the term "foreign firm" as here used is to mean:

> Any individually or collectively owned enterprise (unlimited partnership, joint stock company, limited (commandite) partnership, et cetera) founded outside of the R.S.F.S.R. and other Allied (soviet) Republics, which has legally established in the country of domicile its right for commercial activities (approval of the charter of a joint-stock company, registration of the enterprise with the authorities, taking of a trade license, et cetera).[25]

Likewise, the Law of March 11, 1931, now in force, requires a license for an alien "who is an owner of an enterprise abroad,"[26] to conduct commerce in Soviet Russia. Consequently, only such alien residents of Russia as do not own business abroad, could, perhaps, freely engage in commercial activities permitted to soviet nationals. Otherwise, they come under the provisions established for foreign corporations, i.e., a license is required. Thus, the practical application of Note 1 to Section 8 is broader than its letter. The rule established for "legal entities" is applied to individually owned enterprises, which may not be considered legal entities under their domestic laws.

[23] See Chapter 9, II.
[24] R.S.F.S.R. Laws 1923, text 246. See also Chapter 1, note 69.
[25] *Id.* 1923, text 464, Section 1.
[26] U.S.S.R. Laws 1931, text 197.

On the other hand, by way of concession, it is possible for an alien individual or corporation to enjoy private rights closed to an ordinary soviet citizen, e.g., own an industrial establishment with more than twenty workers, because concession under soviet law means an exemption from a general limitation prescribed for private business. Each concession is a separate and special law.[27] At present, however, concessions "appear very seldom" according to the soviet textbook of 1940.[28]

The survey of restrictions enacted at one time or another by the soviets on the exercise of private rights by aliens justifies the conclusion that, in fact, no definite principle is implied in soviet legislation. These restrictions are so numerous, so scattered and complex, as not to allow any generalization. On the other hand, as is shown *supra,* current soviet statutes lack any explicit statement of equality of aliens with soviet citizens. Neither the equality nor absence of the legal capacity of an alien may be presumed, but the soviet legislation and administrative orders governing the particular field must be consulted in order to ascertain whether a particular private right may or may not be exercised by an alien in the Soviet Union.

The only principle clearly stated in soviet legislation is, that if there is an agreement between the Soviet Union and a foreign country concerning the rights of the nationals of that country, such agreement governs.

[27] For us a concession is a contract of the soviet government with its class enemy—a foreign capitalist—made for the purpose of restoring the productive forces of the country. . . . From the legal point of view, a concession implies an element of exemption from the general regime established by law. A concessionaire is granted rights with regard to the exploitation of the object of concession (in industries, concessions with regard to the industrial enterprise) which under general laws are not granted to private business. Karass, "Concession," Magerovsky, Fundamentals of Soviet Law (in Russian 2d ed. 1929) 356, 358.

[28] Peretersky and Krylov 81.

Therefore, making specific agreements with the Soviet Union appears to be the only safe means by which a country may obtain a legal ground for protection of the rights of its nationals in the Soviet Union.

6. Marriage

Under the soviet law, the so-called territoriality principle applies to marriages between aliens entered into in the Soviet Union. This means that the celebration of such marriages must take place in accordance with soviet laws. This is stated in all the codes of the soviet republics.[29] The same principle was also applied to the marriages of aliens with soviet nationals when, until February 15, 1947, such marriages were allowed (see *supra*).[30] Under the present soviet law, marriage, in order to have legal effect, must be registered in the Civil Registry Office. A religious celebration has no legal effect.[31] The original provisions of the Code of Laws on Marriage that attached legal effect to *de facto* marriage were repealed on June 8, 1944. On the basis of reciprocity, soviet law permits registration of marriages

[29] R.S.F.S.R. Code of Laws on Marriage, Etc., Section 136 (As originally enacted in 1926):

136. Marriages between aliens and soviet nationals, as well as marriages between aliens contracted on the territory of the R.S.F.S.R., shall be registered in accordance with general rules.

The Ukrainian Code, Section 107, and the Byelorussian Code, Section 110, use more definite language, viz., instead of "general rules," they state plainly "soviet law."

[30] See *supra*, note 15.

[31] Edict of the Presidium of the federal Supreme Soviet of July 8, 1944:

19. Be it enacted that the rights and obligations of husband and wife provided for under the Codes of Laws on Marriage, Family and Guardianship of the soviet constituent republics shall arise from legally registered marriages only.

Persons who have been in *de facto* marriage relations prior to publication of the present ukase may legalize their relations by registering the marriage and stating the actual period during which their marital life lasted (Vedomosti 1944, No. 37).

These provisions were incorporated into the Code of Laws on Marriage, Etc. on April 16, 1945. See Vol. II, No. 3.

between aliens at their consulates and embassies, provided the conditions required by the soviet marriage law are followed.[32] All these requirements as well as the development of the soviet marriage and divorce laws are discussed in Chapter 4, I.

7. Rights of Succession of Aliens

The civil codes of the soviet republics do not contain any provisions dealing with the rights of aliens to acquire property by succession. However, it is generally accepted that aliens enjoy the right to inherit property in the Soviet Union from decedent aliens or from soviet nationals alike. In support of this opinion the writers refer to the presumed general principle that aliens enjoy the same private rights as soviet nationals, unless otherwise provided by a special law, administrative order, or an international convention (see *supra* 4). Regardless of the validity of the principle it is important that no such special limitation on the rights of aliens has been established thus far. Moreover, the Statute on Assessment of Inheritance Tax of October 30, 1929, expressly refers to the right of aliens to inherit, as a recognized right. The statute expressly provides that it should apply:

To the property situated within the confines of the R.S.F.S.R. descending by inheritance from aliens to nationals of the U.S.S.R. or to aliens, insofar as an agreement between the U.S.S.R. and the respective country does not provide otherwise.[33]

Although, in connection with the abolition of inheritance tax in 1943, this statute was repealed,[34] this should

[32] R.S.F.S.R. Code, Section 136, Note; Byelorussian Code, Section 10, Note. The Ukrainian Code does not include such a provision.

[33] R.S.F.S.R. Laws 1929, text 793, Section 5.

[34] Vedomosti 1943, No. 3. Prior thereto, on September 10, 1933, the

not affect the rights of aliens to inherit. From its wording it follows that the statute did not enact the right of aliens to inherit but merely referred to it as a recognized right, which therefore should not be affected by the repeal of the statute. Still, no authoritative statement on the point is available. Here again, only an international agreement may offer a solid ground for decision.

The question arises: What law governs the descent and distribution of an estate left by an alien in the Soviet Union, his national law or the soviet law? The answer has far-reaching consequences because the soviet rules of succession are relatively restrictive. What the alien has really needed in the majority of cases, has been exemption from the soviet law of inheritance rather than equal status with soviet nationals. Until recently, at least, his domestic law has been unquestionably more advantageous than the soviet law. Thus, until February 26, 1926, the soviet law limited the value of an estate subject to inheritance to 10,000 rubles net after deduction of funeral expenses and liabilities. After this date, a heavy progressive tax was imposed upon the estate, which tax was abolished on January 9, 1943. The soviet inheritance law also imposes further limitations, which are discussed elsewhere.[35]

Some of the soviet writers, among them the authors of the most recent soviet textbook on conflict of laws (1940), insist that succession of aliens residing in the Soviet Union comes under the territoriality principle;

Council of People's Commissars ordered that the inheritance tax should not be assessed upon property located outside of the Soviet Union whenever it devolves upon the residents thereof (U.S.S.R. Laws 1933, text 349).

[35] Civil Code, Section 416, as originally promulgated; its amendment, R.S.F.S.R. 1926, text 666, Vedomosti 1943, No. 3, 1945, No. 38. See Chapter 17.

that is, the soviet law applies. Advocates of this opinion refer, among other things, to the statutes on aliens of the Ukrainian and the Byelorussian republics and to the Instruction of the R.S.F.S.R. Commissariat for Justice addressed to the State Bank on February 23, 1923.[36] It is true that these statutes submit to soviet law the descent of property left by an alien in Soviet Russia, and that the instruction states in a general way that the law of the place where the succession is opened shall apply, and that this is the place where the property is located. However, this argument is not conclusive. Subsequent to this legislation, other principles have in fact been applied in soviet practice, both to citizens of countries with which Soviet Russia had a divergent agreement, and to citizens of countries with which Soviet Russia had none.

As a matter of fact, various principles have been applied at different times and on different occasions. It is difficult to predict which principle will prevail in the future. The available material permits us to conclude that the following methods have been used in soviet practice in treating the estates of aliens, in addition to the territoriality principle.

Under one alternative, the estate of an alien is turned over in its entirety to his diplomatic or consular representative, to be dealt with according to his national law. This method was provided for by the Peace Treaty entered into by the R.S.F.S.R. with Latvia, August 11, 1920 (Article 17, Section 3), and confirmed by the Commercial Treaty of June 2, 1927 (Section 2, subsection 1(a)), and the protocol thereto.[37] The provisions of the

[36] This is the argument of Makarov, Précis 451 *et seq.* See also Peretersky, Outline of Private International Law (in Russian 1925) 108. Against this point of view, see Egoriev 297.

[37] 1–2 Sbornik (2d rev. ed. 1928) 47; 4 *id.* 62, 67.

1927 treaty are of importance for nationals of any country protected by the most favored nation clause. This clause is stated in the treaty of 1927 with regard to all private rights (Section 2, subsection 1(a)). But the concluding protocol attached to this treaty expressly provided that "the provisions of Section 2, subsection 1 (a), relating to inheritance, do not affect provisions of Article 17, Section 3, of the Peace Treaty of August 11, 1920." Thus, although agreed upon when there was no inheritance in Soviet Russia, this clause providing for the turning over of the entire estate of an alien to his diplomatic or consular representative, was continued after the inheritance provisions of the Civil Code took effect. Consequently, this treatment of an estate of an alien may be considered to be the most favorable and may be invoked by nationals protected by the most favored nation clause. Clauses similar to that of the 1920 treaty were included in the treaties concluded by the R.S.F.S.R. with Lithuania, July 12, 1921, Article 13, Section 5,[38] and Estonia, February 2, 1920.[39]

Another solution is that testate and intestate succession to immovables left by an alien is governed by the soviet law, but succession to movables is governed by the national law of the alien, his movables being turned over to the diplomatic or consular representative of his country.

This principle was stated in the declaration made by the soviet delegation at the International Conference at Genoa in 1922:

> With regard to the succession to movables of deceased aliens, the Russian government has authorized the diplomatic and con-

[38] 1–2 *id.* 163.
[39] *Id.* 67. A similar clause is in the treaty with the Ukrainian Republic of February 14, 1921, Art. 7, Section 4. *Id.* 71.

sular representatives of the foreign countries to undertake measures of protection of estates left by their deceased nationals, as well as to turn over such estates to the heirs by operation of law, or to the testamentary heirs in accordance with the laws of the country of the deceased.[40]

This principle was also stated in the treaty between the Ukraine and Estonia, of November 25, 1921 (Section 11), by the treaties and conventions of the U.S.S.R. with Italy, February 7, 1924 (Section 11), Germany, October 22, 1925 (Article 22, Appendix, Section 18), Norway, December 25, 1925 (Section 12), Poland, July 18, 1924 (Section 17, subsection 2).[41]

On the basis of reciprocity, similar treatment has been accorded in at least two instances to nationals of foreign countries which had, at the time, no agreement on the matter with the Soviet Union. Litvinoff, then Deputy Commissar for Foreign Affairs, in a memorandum replying to an inquiry by the Swedish minister in Moscow, wrote on March 23, 1925:

> The government of the Soviet Union, in accordance with the principle applied in international practice, is always ready to agree that the national law of the decedent be applied to the movables of a deceased national of either country on the basis of reciprocity, even in the absence of a formal convention, and that his estate be handed over to the diplomatic or consular representative of the country of the decedent for descent and distribution according to the law of that country. So far as immovables are concerned, in accordance with the same practice, the law of the place where the property is situated must be applied.[42]

Likewise, in a verbal note of April 15, 1924, the Com-

[40] Materials of the Genoa conference published by the R.S.F.S.R. Commissariat for Foreign Affairs (in Russian 1922) 46, quoted from Makarov, Précis 453.

[41] 1–2 Sbornik 71, 169; 3 *Id.* 118, 44.

[42] Replying note of Litvinoff, Deputy Commissar for Foreign Affairs to the Swedish Minister in Moscow of March 23, 1925, quoted in Egoriev 301.

missariat for Foreign Affairs informed the British Embassy concerning movables left by a deceased British national in Moscow, that "following the general rules of international law, the Commissariat for Foreign Affairs sees no objections to the turning over of said property to the British Embassy to be disposed of in accordance with British laws." [48]

This practice, approved by soviet writers, raises a perplexing problem. Soviet law, in view of the abolition of private ownership of land, has expressly repealed the division of property into movables and immovables (Civil Code, Section 21). What then would be the criterion for the drawing of a distinguishing line between movables and immovables for the purpose of application of this principle?

A direct answer is to be found only in the final protocol to Section 11 of the convention concerning inheritance concluded with Germany on October 12, 1925, and appended to Section 22 of the consular convention of the same date. It reads:

> Because the legislation of the U.S.S.R. does not recognize the distinction between movables and immovables, the principle of application of the local law to so-called immovables (*lex rei sitae*) is extended in the U.S.S.R. to the following categories of property: buildings of any kind and building tenancy.[44]

There is not much clarity with regard to the requirement of a will made abroad but disposing of property located in the Soviet Union. This is discussed in Chapter 17, Inheritance Law, IV, 10.

The attitude of soviet law toward succession by soviet citizens to property located outside the Soviet Union, is discussed in Chapter 8, V.

[43] *Id.* 297–298.
[44] 3 Sbornik 34.

8. Status of United States Nationals in the Soviet Union

No special agreement between the United States and Soviet Russia has been promulgated thus far to define this subject. However, two of the letters exchanged on November 16, 1933, between President Roosevelt and Maxim Litvinoff, Commissar for Foreign Affairs, contain a definite stipulation on behalf of the soviet government of legal protection to nationals of the United States on the basis of the most favored nation clause. Mr. Litvinoff stipulated and President Roosevelt agreed that the:

"Nationals of the United States shall be granted rights with reference to legal protection which shall not be more unfavorable than those enjoyed in the U.S.S.R. by nationals of the nation most favored in this respect. Furthermore, I desire to state that such rights will be granted to American nationals immediately upon the establishment of relations between our two countries." [45]

[45] U. S. Department of State, Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics (Washington 1933) 11–12.

Washington, November 16, 1933.

My dear Mr. President:

Following our conversations I have the honor to inform you that the Soviet Government is prepared to include in a consular convention to be negotiated immediately following the establishment of relations between our two countries provisions in which nationals of the United States shall be granted rights with reference to legal protection which shall not be less favorable than those enjoyed in the Union of Soviet Socialist Republics by nationals of the nation most favored in this respect. Furthermore, I desire to state that such rights will be granted to American nationals immediately upon the establishment of relations between our two countries.

In this connection I have the honor to call to your attention Article 11 and the Protocol to Article 11, of the Agreement Concerning Conditions of Residence and Business and Legal Protection in General concluded between Germany and the Union of Soviet Socialist Republics on October 12, 1925.

Article 11.

Each of the Contracting Parties undertakes to adopt the necessary measures to inform the consul of the other Party as soon as possible whenever a national of the country which he represents is arrested in his district.

The same procedure shall apply if a prisoner is transferred from one place of detention to another.

9. Status of Foreign Corporations in the Soviet Union

The language of Notes 1 and 2 to Section 8 (quoted

Final Protocol

Ad Article 11.

1. The Consul shall be notified either by a communication from the person arrested or directly by the authorities themselves. Such communications shall be made within a period not exceeding seven times twenty-four hours, and in large towns, including capitals of districts, within a period not exceeding three times twenty-four hours.

2. In places of detention of all kinds, requests made by consular representatives to visit nationals of their country under arrest, or to have them visited by their representatives, shall be granted without delay. The consular representative shall not be entitled to require officials of the courts or prisons to withdraw during his interview with the person under arrest.

I am, my dear Mr. President,
Very sincerely yours,

Maxim Litvinoff
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

Mr. Franklin D. Roosevelt,
President of the United States of America,
The White House.

The White House
Washington, November 16, 1933.

My dear Mr. Litvinov:

I thank you for your letter of November 16, 1933, informing me that the Soviet Government is prepared to grant to nationals of the United States rights with reference to legal protection not less favorable than those enjoyed in the Union of Soviet Socialist Republics by nationals of the nation most favored in this respect. I have noted the provisions of the treaty and protocol concluded between Germany and the Union of Soviet Socialist Republics on October 12, 1925.

I am glad that nationals of the United States will enjoy the protection afforded by these instruments immediately upon the establishment of relations between our countries and I am fully prepared to negotiate a consular convention covering these subjects as soon as practicable. Let me add that American diplomatic and consular officers in the Soviet Union will be zealous in guarding the rights of American nationals, particularly the right to a fair, public and speedy trial and the right to be represented by counsel of their choice. We shall expect that the nearest American diplomatic or consular officer shall be notified immediately of any arrest or detention of an American national, and that he shall promptly be afforded the opportunity to communicate and converse with such national.

I am, my dear Mr. Litvinov,
Very sincerely yours,

Franklin D. Roosevelt

Mr. Maxim M. Litvinov,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

supra 1) does not express precisely the true meaning of the provisions contemplated by the Notes. Note 1 states that a foreign corporation may be recognized in Soviet Russia as a legal entity only pursuant to the grant of a special permit (license) issued by the soviet government to such corporation. However, the concept of a legal entity as defined in Section 13 of the Civil Code embraces the right "to sue and be sued in court." The right to sue defendants residing within the Soviet Union in soviet courts on claims arising outside its territory is explicitly granted by Note 2 to any foreign corporation on the basis of reciprocity. What the soviet legislators had in mind in Note 1 was not the "recognition of rights of a legal entity" but factual "admittance to activities" in the Soviet Union. This construction is supported by the legislation issued in furtherance of Section 8, Note 1, and is generally accepted by soviet theorists and practice.

Thus, the textbook on private international law of 1940 states:

> The soviet law has established the requirement of a special permit for each case of admittance of a foreign legal entity to the U.S.S.R. This is a method of protection of our socialist State from any concealed attempt at economic penetration on the part of foreign capital.[46]

The principle of individual licenses to admit foreign corporations to activities within the Soviet Union has been consistently respected in all international conventions made by Soviet Russia. It was stated in Section 9 of the treaty with Italy of 1924 and the final protocol to Section 14 expressly provided for registration with the soviet authorities of Italian firms desiring to carry on

[46] Peretersky and Krylov 80.

business in Soviet Russia, and for the right of the authorities to refuse such registration.[47] Section 16 of the convention on settlement with Germany of 1925, stated that "admittance (of foreign firms) to business activities in the territory of the other party shall be determined by the laws and regulations in effect at the time in that country."[48] Thus, the soviet law requiring a license in such cases governed the admittance of German corporations. Section 12 of the treaty of 1939 with China and Section 8 of the treaty with Iran of 1940 grants to Chinese and Iranian corporations most favored nation treatment "in the exercise of their business activities in the territory of the U.S.S.R. in keeping with the conditions under which such activity is permitted by the soviet legislation."[49] In other treaties, the corresponding provisions were for the most part confined to the most favored nation clause. (See the commercial conventions with Great Britain of 1934, Section 1, Yugoslavia of 1940, Section 13, and Bulgaria of 1940, Section 20.)[50]

The requirement of a special license refers not only to foreign corporations but also to a "firm"—which means a business owned by an individual businessman (see *supra*).

When private industrial activity was to an extent permitted in Soviet Russia, foreign firms were admitted only on the basis of concession. At present, according to the soviet textbook:

> One can speak of "admittance" of foreign capital primarily with respect to foreign firms contracting export and import

[47] 3 Sbornik 118.
[48] 3 *id.* 34; Peretersky and Krylov 83.
[49] Peretersky and Krylov 83.
[50] *Ibid.*

transactions in the Soviet Union, i.e., carrying on merely commercial activities. Other forms of application of foreign capital to economic activities in the U.S.S.R., concessions in particular, are seldom to be found.[51]

With regard to commercial activities, the Resolution of the Central Executive Committee and Council of People's Commissars of the U.S.S.R. of March 11, 1931,[52] requires a special permit for conduct of business in the territory of the U.S.S.R. According to this resolution, foreign commercial and industrial organizations, and foreigners who own enterprises abroad, need a special permit from the People's Commissar for Foreign Trade for admittance to activities in the Soviet Union (Section 1). In such permit the conditions under which the firm is admitted, the scope of operations permitted, and the period of time for which it is issued, shall be indicated (Section 8). In their business, foreign firms are subject to all effective soviet laws, decrees, etc. (Section 9). Where the activities of a foreign firm in soviet territory are limited to negotiating and contracting individual transactions with the soviet authorities in charge of foreign trade and do not have the nature of permanent commercial business, foreign corporations and businessmen need no permit for admittance to business in the U.S.S.R. (Section 12). The soviet textbook comments:

> Thus, if a representative of a foreign firm comes to the Soviet Union by invitation or permission from a soviet organization in charge of foreign trade for negotiation or for contracting of an individual transaction, i.e., for a short period, in such a case the foreign firm does not have to obtain a permit to do business in Soviet Russia and register for admittance to commercial operations. Such cases do not in-

[51] *Id.* 81.
[52] U.S.S.R. Laws 1931, text 197. For a full translation, see Vol. II, No. 22.

volve permanent commercial activity in Soviet Russia and, consequently, there is no need for a special permit. For the same reason, this provision of law cannot be considered as an exemption from the license system for foreign corporations established in the Soviet Union.[53]

All import and export transactions occurring in the territory of the U.S.S.R. come under soviet laws;[54] by the Decree of February 2, 1936, all such transactions are subject to a ¼ per cent tax on their amount, computed in soviet currency.[55]

We have dealt thus far with commercial profit-making organizations. A special Law of 1937 determines the admittance of nonprofit organizations[56] and requires the obtaining of a license for their admission.

Under the license system, established in soviet law for the admittance of foreign corporations, "the determination by formal criteria of the nationality of corporations loses its importance to a great extent."[57] As a matter of fact, various principles were followed in the international conventions concluded by the Soviet Union. In some instances, the principle adopted was that of the corporate domicile (Convention with Germany of 1925, Section 16; Convention with Yugoslavia of 1940, Section 13). In other instances, it was the place of incorporation (Convention with Great Britain, 1934, Section 1; China, 1939, Section 12; Iran, 1940, Section 8) or both (Italy, 1924, Section 9; Bulgaria, 1940, Sec-

[53] Peretersky and Krylov 82.

[54] Peretersky and Krylov 82, note, 109, 115. Concerning the requirements respecting signature on the part of soviet organizations for transactions in foreign trade, see *id.* 116–117, translated in Chapter 13, IV.

[55] U.S.S.R. Laws 1936, text 41.

[56] U.S.S.R. Laws 1932, text 404.

[57] Peretersky and Krylov 80.

tion 20). With regard to corporations of countries which appeared in the territory of old Russia (viz., Latvia and Lithuania during their independence), the nationality of a corporation was determined by the nationality of the majority of shareholders.

Chapter 11

Corporations and Other Legal Entities in Soviet Law

1. Terminology

The term "legal entity" has been selected to translate the Russian *iuridicheskoe litso,* the exact equivalent of *personne morale* in French, *Rechtsperson* in German, and *ente legale* in Italian. This term, sometimes translated as "legal" or "juridical personality," is close to, though not identical with, the corporation in Anglo-American law. A legal entity may be defined as an entity, other than a human being, which is regarded in law as capable of owning property, of making contracts, of suing and being sued in court. In that sense, it may be called an artificial being or a legal personality in contrast to a natural person—a human being. Although nonsoviet European law recognizes legal entities of public law comparable to public corporations, i.e., governmental or public organizations enjoying one or another of the above-mentioned rights, for a nonsoviet jurist such terms as corporation or legal entity mean primarily a private corporation, i.e., an association of persons enjoying such rights in the pursuit of private business. The reverse is true of soviet law. The concept of a corporate body was used by soviet legislators to build up a system of management of government-owned industries and commerce after the pattern of capitalist corporations. Thus, though Section 13 of the Civil Code

includes among legal entities "associations of persons," which include private corporations, the other clause extending the status of a legal entity to "organizations and institutions" has in mind primarily the government agencies set up for the management of government-owned industry and commerce. These provisions, together with those of Section 19, lay the foundation for a special legal status of governmental quasi corporations, through which the government manages the multifarious business of nationalized economy, in contrast to agencies performing regular functions of public administration. These organizations should be called "quasi corporations" and not "corporations" because their capital is not divided into shares, there are no shareholders, and they are in fact governmental agencies operating under special status. The term "legal entity" in soviet law now means primarily a governmental agency engaged in business that in nonsoviet countries is conducted by private enterprises. Hence, soviet law distinguishes between two kinds of government agencies: institutions "on government budget" and enterprises (organizations) operating "on a commercial basis" or "on a business basis" (*kommerchesky raschet, khoziaistvenny raschet*). This distinction, which originated with the New Economic Policy, somewhat faded recently in theory and practice; which is discussed *infra* (6 through 8). At this point, an outline of each type of agency in its purest form is given under 2 and 3.

2. Agencies on Government Budget (*Gosbudjetnye uchrejdeniia*)

These agencies are public authorities in charge of administrative affairs common to all governmental

agencies of the world. They have no economic independence. Their appropriations and expenditures are specified in the governmental budgets: federal, or of individual republics, regions, districts, etc., as the case may be. Such an institution may spend money only for purposes directly specified in the budget and has no right to make expenditures not covered by appropriations or in excess of appropriations.[1]

Their limitations in trading are defined by an R.S.F.S.R. statute as follows:

> 1. Institutions which are on the governmental budget may conduct only such business transactions as are immediately connected with their functions or necessary for the fulfillment of tasks assigned to them.
>
> Note: Institutions mentioned in the present section may participate in business only by means of organizing enterprises on a commercial or business basis in accordance with pertinent laws.[2]

Transactions coming within the scope of their capacity are those involving the buying of fuel, furniture, stationery, tools, and materials necessary for the normal functioning of the institution. An institution is liable under a contract only within the existing appropriation.[3] Although some such agences may have so-called "special funds" composed of collections specified by statute, primarily of fees of various kinds which are not included

[1] Instruction of the U.S.S.R. People's Commissariat for Finance of February 9, 1937 (1937) Financial and Economic Legislation No. 8/9, 5; 1 Civil Law Textbook (1938) 85; 1 Civil Law (1944) 161.

[2] Joint Resolution of the R.S.F.S.R. Council of People's Commissars and the Central Executive Committee of September 27, 1926, R.S.F.S.R. Laws 1926, text 499.

[3] 1 Civil Law Textbook (1938) 85; 1 Civil Law (1944) 160; Evtikhiev and Vlasov, Administrative Law (in Russian 1946) 35. Collection of claims against institutions financed through the budget is regulated by the Act of August 7, 1937, U.S.S.R. Laws 1937, text 218, and Instruction of the Government Arbitral Tribunal of February 26, 1939 (1939) Financial and Economic Legislation No. 11, 7.

in the regular budget, these funds may be spent only for purposes specified by statute in accordance with special estimates, subject to approval by the authorities of a republic or region.[4]

There are also agencies, financed through the government budget, enjoying nevertheless the status of legal entities by virtue of express statutory provisions. To this category belong certain administrative bodies, such as local soviets.[5] Separate statutes recognize the status of a legal entity as belonging in particular to such village soviets as have their own budgets,[6] to city soviets,[7] and to district,[8] and regional (provincial) soviets.[9] Some institutions of learning, e.g., the Academy of Science and universities enjoy the same status.[10] The State Bank of the U.S.S.R. is also a legal entity.[11]

3. Agencies Operating on a Business Basis (*Predpriyatiya perevedennye na khoziaistvenny raschet*)

These agencies are in a way similar to government-owned corporations in other countries. Each is an independent legal entity, organized under a separate charter specifying the amount of government money or property given to it for the conduct of a business usually conducted in capitalist countries by private corporations or individual businessmen. Such enterprises operate

[4] R.S.F.S.R. Laws 1944, text 42, Sections 1, 2, 5, 11. For previous regulations concerning such funds, see R.S.F.S.R. Laws 1933, text 136; *id.* 1936, texts 124, 135; *id.* 1944, text 20.

[5] U.S.S.R. Laws 1929, text 26.

[6] R.S.F.S.R. Laws 1931, text 142, Section 4; 1 Civil Law (1944) 159.

[7] U.S.S.R. Laws 1928, text 86, Section 22; *id.* 1929, text 26, Sections 5–9.

[8] R.S.F.S.R. Laws 1931, text 143, Section 13.

[9] *Id.* 1928, text 503, Section 20.

[10] Statute of the Academy of Science, U.S.S.R. Laws 1935, text 484. Standard Statute of a University, *id.* 1938, text 237, Section 54.

[11] Statute of the U.S.S.R. State Bank of June 12, 1929, Section 2; U.S.S.R. Laws 1929, text 333.

"on a commercial (business) basis," [12] that is to say, they must produce profit or at least be self-supporting, unless otherwise planned by the government creating such agency. In any event, they conduct business with a degree of independence, enter into contracts with each other or private persons, possess separate property, acquire rights and incur obligations (issue negotiable instruments, et cetera) as independent legal entities (Civil Code, Sections 13, 14, 15, 16, 19). However, a part of their property is exempt from any attachment by their creditors (Sections 19, 21, and, especially, 22). In their charters a standard phrase is used, taken from the statute on trusts, stating that such organization is not liable for debts incurred by the government treasury and that the treasury is not liable for the debts of the quasi corporation. This phrase has in fact a highly conventional meaning, because in the long run all the assets of a quasi corporation belong to the treasury. It means that a party who has made a contract with one government agency enjoying the status of a legal entity may claim performance or damages only from the other party to the contract and not directly from the government treasury or another of its agencies enjoying similar status. Moreover, a certain portion of government property assigned to such quasi corporation may not be transferred to private persons under any title whatsoever and is not subject to mortgage or execution for the benefit of creditors (Civil Code, Section 22). This applies to industrial and commercial establishments as a whole, their equipment and buildings, as well as the

[12] The term and the idea were derived from prerevolutionary experience with some governmental plants, in particular the Obukhovsky Steel Works in Leningrad. Venediktov, The Legal Nature of Governmental Enterprises (in Russian 1928) 9, note 3.

numerous installations specified in Section 22 of the Civil Code, seagoing vessels, aircraft, et cetera. Thus, only cash and goods are practically at the free disposal of quasi corporations and accessible to their creditors.[13]

Moreover, governmental quasi corporations are subject to control and direction by the government departments (prior to 1946 called people's commissariats, later ministries), federal or state, that are in charge of the branch of industry or commerce to which the business of a given governmental quasi corporation belongs. These "economic" commissariats (since 1946 called ministries) such as that for heavy industry, food industry, et cetera, do not operate by making precise assignments to each enterprise but allow them to contract among themselves within a general plan and a plan for a given enterprise. Interrelations of these entities "involving supply of goods, performance of work, and rendering of services, must be determined by contracts" [14] within the general frame of the governmental plan. Though bureaucratic agencies, the quasi corporations are expected to act with the competitive vigor of private enterprises (principle of socialist competition). Traditional competitive devices of a capitalist world—firm names and trade marks—are applied by the soviets to give a touch of business personality to each governmental agency engaged in trade, thus stimulating their competition. However, while in a capitalist country the use of a trade-mark is the right of a business, it is the duty of a soviet business concern to attach its trade-mark to any of its products.[15]

[13] 1 Civil Law Textbook 88; 1 Civil Law (1944) 167.

[14] Mozheiko and others, Arbitration in the Soviet Economy (in Russian 1936) 5.

[15] See translation of excerpts from respective decrees *infra*, Vol. II, No. 2, comment to Section 19 [a].

There is also another more potent incentive to individual business efficiency in a government enterprise. Earnings of all its employees and of the managing personnel in particular depend to an extent upon the business efficiency of the whole enterprise (principle of "check by ruble"). Business success brings definite individual profit; business failure incurs, for those holding administrative posts, heavy responsibilities. At present, the management is not placed in the hands of a collective body (board of directors), as was the practice in the early days of the New Economic Policy, but in those of a director who is appointed by the people's commissar (since 1946 minister), under whose authority the enterprise operates, and who bears personal responsibility for the conduct of business and the appointment and dismissal of all employees.

While in the first years of the soviet regime there was a tendency to pay employees in government-owned industries by time according to a nationwide schedule, the principle of piecework has been given preference officially since 1931.[16] Since 1934, no minimum remuneration has been guaranteed to a worker independently of his efficiency. Regardless of whether an employee is paid by time or by piece, he must attain a standard of output established by the management. If he fails to do so through his fault, he is paid according to the quality and quantity of the output attained.[17] Progressive scales of piecework wages and bonuses for extra efficiency are issued for individual branches of industry

[16] Grishin, The Soviet Labor Law (in Russian, Moscow 1938) 167, 168. See statements by Stalin quoted *supra*, Chapter 3, note 3.

[17] U.S.S.R. Laws 1934, text 109; R.S.F.S.R. Laws 1934, text 146. Labor Code, Sections 56, 57 (as amended in 1934). See Chapter 3, p. 94, and Chapter 22.

and aggregates of enterprises.[18] Although the total amount of regular wages to be paid in an individual enterprise is subject to determination by central government bureaus,[19] bonuses are dependent upon the profits or savings of an individual enterprise. They are paid from the so-called director's fund established in each enterprise by the appropriation of a certain percentage of the profits or savings.[20] The distribution of bonuses from the fund is at the discretion of the director. His bonus also depends upon the efficiency of the enterprise, and, in case the output falls below standard in volume or quality, he is liable to imprisonment for up to eight years.[21] He may also be prosecuted in court in case of failure to impose upon employees the strict penalties prescribed for tardiness and loitering on the job.[22]

From July 1, 1941, the levies for the director's fund and payment of bonuses from it were discontinued. Beginning with 1942, bonuses were paid only from special

[18] There are no general laws to this effect, but there are individual orders of this type. See U.S.S.R. Laws 1929, text 620; *id.* 1933, texts 183, 242; *id.* 1935, text 334; *id.* 1938, text 214; *id.* 1939, text 119. See Grishin, *op. cit.* 172 *et seq.*, 178; Soviet Labor Law Textbook (in Russian 1939) 129 *et seq.* A special law provides also for a salary which may be granted to an individual employee in any amount, a so-called "personal salary." U.S.S.R. Laws 1938, text 229.

[19] See Chapter 22, p. 808.

[20] *Id.* 1936, text 169. For translation, see *infra,* Vol. II, Nos. 14–17.

[21] Edict of the Presidium of the Supreme Council of July 10, 1940 (Vedomosti, July 20, 1940, No. 23):

2. In case of insufficient production or the release of products which are defective or violate the established standards, the directors, the chief engineers, and the chiefs of the divisions of technical control of industrial enterprises shall be brought before the court and shall be punished by the court by imprisonment for a period of from five to eight years.

Prior to this edict, the managing personnel were liable to imprisonment for from five to ten years in the event that similar defects were caused by their carelessness. (Section 128[a] of the R.S.F.S.R. Criminal Code, as amended in 1934.) See also Chapter 22.

[22] U.S.S.R. Laws 1939, text 1, Izvestiia, January 9, 1939; Edict of June 26, 1940, Vedomosti, July 5, 1940, No. 20, also August 22, 1940, No. 28.

[Soviet Law]

funds allocated by the government for this purpose.[23] On December 5, 1946, the director's fund was officially reestablished but new and rather complex rules for its handling were inaugurated (for a translation, see Volume II, Nos. 16 and 17). All productive establishments are divided into three groups, the percentages of levy to the director's fund from the planned profit or saving of each group being 2, 4, and 10 per cent respectively. The percentage of levy from the profit or saving in excess of the plan is 75, 50, and 25 per cent respectively. The higher the percentage of levy from the planned profit or saving, the lower is the rate established for the excess profits. Most of the industries producing consumers' goods come under the levy of 2 per cent from planned profit, and the total amount of their contribution to the fund, both from planned profit or saving resources and those in excess of plan, may not exceed 5 per cent of the total wage fund assigned for production personnel of the establishment.

The economic and legal independence of the soviet quasi corporations should not be overrated. The characteristic given above is rather the blueprint than the reality. The problem is discussed at length *infra* under 6 and especially under 8.

4. Scope of Legal Capacity of Legal Entities

Under the soviet law a legal entity enjoys a restricted capacity. Although the soviet theorists[24] apply a term borrowed from the French jurisprudence—principle of special legal capacity (*principe de la specialité* in

[23] Aleksandrov and Moskalenko, The Soviet Labor Law (in Russian 1944) 86; Zimeleva, Civil Law (1945) 78. See Chapter 3, p. 810.

[24] 1 Civil Law Textbook (1938) 78; 1 Civil Law (1944) 147; Zimeleva, Civil Law (1945) 30.

French)[25]—to the doctrine which governs these restrictions, it is much closer to the *ultra vires* principle in Anglo-American law. As a rule, a legal entity does not come into being by itself under the soviet law, but an act of the authorities, viz., approval of the charter, registration, or statutory provision, is required to grant status as a legal personality to an organization. A legal entity possesses only such powers as are necessary for the pursuit of the purpose for which it was created. These powers are conferred upon the legal entity by its charter or the statute under which it is instituted. Moreover, these powers may be used only with regard to such business transactions as come within the scope of the activities of the legal entity, as specified by charter or statute. This principle was formulated by an early enactment, referred to as recently as 1944, as follows:

1. Governmental industrial and commercial institutions and enterprises may sell only articles of their own production or articles the trading in which comes within the scope of their business as defined by charter or statute.

2. Governmental industrial and commercial institutions and enterprises may buy only such articles as are needed for their own production or as come within the scope of their trading activities as defined by charter or statute.[26]

The principle stated here with regard to governmental legal entities is considered applicable to all legal entities.[27]

[25] This doctrine evolved during the nineteenth century. For a discussion of it in English, see Sir Maurice Sheldon Amos and F. Parker Walton, Introduction to French Law (1935) 52. See also Planiol, 1 Traité élémentaire de droit civil (1943) No. 720, at 275.

[26] R.S.F.S.R. Laws 1923, text 173; Civil Code (1943) 134; 1 Civil Law (1944) 167. Circular Letter of the Commissariat for Foreign Trade of January 9, 1939, Arbitration in Soviet Economy (in Russian 3d ed. 1941) 175.

[27] 1 Civil Law Textbook (1938) 78, 98; 1 Civil Law (1944) 147–148.

5. Dissolution of Legal Entities

The general principle governing this matter is formulated by the soviet textbook of 1938 as follows:

> In a socialist state, the activities of a legal entity are subordinate to a plan and to the purposes for which it was created. Therefore, the coming into being of a legal entity and its termination are determined, as a rule, by the plan, the socialist construction, the interests of the State.[28]

The textbook of 1944 is more specific in stressing the power of the government to dissolve a legal entity:

> In the soviet State, the activities of legal entities are subordinate to the interests of promoting socialism. Business organizations are guided in their activities by the economic plan; public organizations are guided by their objectives stated in Section 126 of the Constitution as they are included in the general plan of social and cultural construction of the socialist State. Therefore, the termination of such legal entities as government institutions and government enterprises may take place only upon the decision of a competent government agency; the co-operatives and public organizations may cease to exist either by decision of a competent government agency or on their own initiative.[29]

Consequently, a legal entity may be discontinued by order of the government because of the changing of the plan or bankruptcy. Provisions with regard to bankruptcy as outlined in Chapters 37, 38, and 39 of the Code of Civil Procedure are considered out of date.[30] The principal method of termination of governmental

[28] *Id.* 80; similarly 1 Civil Law (1944) 152, 154.

[29] 1 Civil Law (1944) 153. Section 126 of the Constitution is quoted *infra*, p. 391.

[30] *Id.* 81; 1 Civil Law (1944) 155. For an exposé of these provisions, see Hazard, "Soviet Government Corporations" 41 Mich. L. Rev. (1943) 850, which article gives a general picture of provisions governing governmental trading organizations. In defining the share of income to be spent for bonuses as 10 per cent, however, the author used some out-of-date material of 1928, superseded by the Decree of 1936, which reduced the percentage to four, see *infra*, Vol. II, No. 14.

legal entities at present is reorganization (merger, subdivision, et cetera).[31] A nongovernmental legal entity may also be discontinued voluntarily by decision of its authorized agency. If it was created for a certain period of time, it comes to an end upon the expiration of that period. If created for the achievement of a specified purpose, it ends when the purpose has been achieved.[32]

6. Doctrine of Legal Personality in Soviet Law

This question has been widely discussed by soviet jurists but is far from settled. The text of Section 13 of the Civil Code clearly shows that its framers had in mind a distinction between two types of entities established by the German and Swiss Civil Codes and French jurisprudence,[33] viz., "associations of persons" (*Verein* in German, *société* in French) on the one hand and so-called "foundations" (*Stiftung* in German, *fondation* in French), i.e., aggregates of properties devoted to a definite purpose, on the other. The latter are no doubt covered by the provisions of Section 13 contemplating the status of a legal entity for "organizations and institutions." The most common legal entity in Soviet Russia, a government trading quasi corporation, is recognized by some authors as closer to the type of "foundation" of Western European law than to a corporation (*Verein, société*).[34] However, the recent textbook (1944) states resolutely that this classification "does not fit the soviet law because it does not show the actual

[31] 1 Civil Law Textbook (1938) 80; 1 Civil Law (1944) 155, 174.
[32] *Id.* 82; Civil Law (1944) 153.
[33] German Civil Code, Articles 21 *et seq.* and 80 *et seq.;* Swiss Civil Code, Articles 52 *et seq.* and 80 *et seq.;* Sir Maurice Sheldon Amos and Walton, Introduction to French Law (1935) 50; Michoud, 1 Théorie de la personalité morale (3d ed. 1932) Section 76.
[34] Venediktov, "Governmental Legal Entities in the U.S.S.R." (in Russian 1940) Soviet State No. 10, 64.

differences between the various types of legal entities existing in the Soviet Union." [35] Likewise, the authors of the book repudiate the usefulness for soviet law of any distinction between private and public corporations because of the absence of private organizations in the Soviet Union. The textbook states:

> Private institutions provided for in Section 15 of the Civil Code [hospitals, museums, institutions of learning, public libraries, et cetera] ceased to exist in the Soviet Union long ago. Public organizations which are formed by the toilers under Section 126 of the Constitution through the medium of the government power are not private but public corporate bodies.
>
> In our civil law, legal entities are subdivided into: (a) governmental institutions; (b) governmental enterprises; and (c) public organizations (including co-operatives). Besides, the soviet State as the fisc (treasury) is a separate holder of rights and therefore a separate legal entity.[36]

The term "governmental institutions" covers in fact government agencies financed through the budget and discussed above under 2. By governmental enterprises in this statement are meant those operating on a commercial basis and discussed under 3. The existence of public organizations is provided for in Section 126 of the 1936 Constitution in the following terms:

> 126. In conformity with the interests of the toilers and in order to develop the organized activity and political vigor of the masses of the people, citizens of the U.S.S.R. shall be ensured the right to unite in public organizations—trade-unions, co-operatives, youth organizations, sport and national defense organizations, cultural, technical and learned societies; and the most active and most politically conscious citizens in the ranks of the working class and other strata of toilers shall unite in the Communist Party of the Soviet Union (Bolsheviks), which is the vanguard of the toilers in their struggle to strengthen and develop the socialist regime and shall be the directive core of all organizations of the toilers, both public and governmental.

[35] 1 Civil Law (1944) 146.
[36] *Ibid.*

The Communist Party excepted, "public organizations," thus defined, embrace trade-unions, co-operatives, and all other nonprofit organizations, or in soviet terminology "voluntary associations" (see *infra*, under 11). Their status in general is characterized in the textbook of 1944, as follows:

> Government property as the domain of all the people constitutes the foundation of the formation and activities of the co-operatives, trade-unions, and voluntary societies and associations of various kinds provided for in Section 126 of the Constitution; their activities are guided by the Communist Party and agencies of governmental power; property belonging to these public organizations is included in the system of socialist property. The internal structure of such organizations, though insuring independence of their members, does simultaneously secure governmental direction of the activities of these organizations and the achievement by them of assigned nationwide tasks and objectives.
>
> The distinction between government agencies and public organizations, drawn in Section 126 of the Constitution, cannot be regarded as a difference between "foundations" and "corporations." This difference is one between two methods or two forms of organized activities of toilers working to promote socialism.[37]

This general characteristic of all types of legal entities under soviet law justifies the opinion of the authors of the textbook of 1944 that notions taken from the corporation law of capitalist countries do not fit the soviet corporate bodies. These lack the basic elements of our corporations, they are neither free enterprises nor independent private institutions. As follows from the quotation, the all-embracing governmental control is equally applicable to business establishments operated by the soviet government and to other organizations enjoying the status of legal entities under soviet law. The legal entities of the soviet government are in fact sham en-

[37] *Id.* 147.

tities, and their mutual contracts are sham contracts. The soviet quasi corporations lack that sufficient freedom of disposal over their property which is the economic background of a true corporate status. The property handled by them is not in fact their property but the property of one single owner—the soviet State. Likewise their mutual contracts, being controlled by the general plan and various directives from top agencies, do not express the free will and individual initiative of the executives of the quasi corporations.

Beginning with the standard treatise of the early days by Stuchka, soviet texts on private law discuss Western European theories, uniformly rejecting them all and uniformly failing, until recently, to offer instead a constructive theory. The theory of legal fiction first stated by Innocent IV in the Canon Law and then developed by von Savigny and accepted by Anglo-American law; Otto von Gierke's theory of collective organism; the theory of property assigned to serve a purpose (*Zweckvermögen*) put forward by Brinz and Binding; the theory of property serving certain interests, of Rudolf von Ihering; and the theory of collective property of Planiol [38]—all are equally rejected as futile attempts to give a satisfactory explanation of the economic phenomenon

[38] *Cum collegium in causa universitatis fingatur una persona,* Innocent IV, in Quinque Libros Decretalium (1478, 1481, 1570, 1610); Savigny, 2 System des heutigen römischen Rechts (1840) 1–2, 236–241, 282, 312, 317, 324; Brinz, 1 Lehrbuch der Pandekten (2d ed. 1873) 201–207; R. v. Ihering, Geist des römischen Rechts, III Teil, 1 Abt. (1865) 210–213, 316–318, 330–334; *id.,* 2 Zweck im Recht (4th ed. 1904) 365–366, 440 (in English, Law as Means to an End); Otto v. Gierke, Das Wesen der menschlichen Verbände (1902); *id.,* Die Genossenschaftstheorie (1887) 5, 11, 603–609, 629; *id.,* 1 Deutsches Privatrecht (1895) 466–474; Planiol, 1 Traité élémentaire de droit civil (10th ed. 1925) Nos. 363, 3007, 3017, 3019; Saleilles, De la Personalité juridique (2d ed. 1922); Suvorov, Legal Entities under Roman Law (in Russian 2d ed. 1900); Eliachevich, Legal Entity, Its Origin and Function in Roman Law (in Russian 1910), revised French edition, La Personalité juridique en droit privé Romain (1942).

of big business.[39] None of these is considered to fit the status of a soviet legal entity.

In their quest for a soviet doctrine of a legal entity, the soviet jurists faced a particularly difficult problem.[40] In contrast to the corporate bodies of the nonsoviet world, soviet legal entities do not have any independent existence. The soviet theorists had to reconcile the principle of total state ownership of all economic resources with some degree of freedom conceded to individual government agencies in their handling of these resources. Because, as a soviet book puts it, "Recognition of the status of a legal entity for governmental enterprise is the most essential condition for the legal stability of the 'commercial basis principle' in their activities."[41] Under the New Economic Policy the governmental legal entities, which at that time were occasionally organized as stock companies and even as mixed corporations with the participation of private capital, operated with a great deal of independence. Legal writers sought to apply to them constructions borrowed from Western law. Thus the name *trest*, the Russian equivalent of "trust," is used in soviet legislation to designate

39 Stuchka, 2 Course (1931) 62 *et seq.*, 76 *et seq.*; Gintsburg, 1 Course 248 *et seq.*; 1 Civil Law Textbook (1938) 125–128; 1 Civil Law (1944) 196 *et seq.* "Not one bourgeois jurist gave a correct explanation of the nature of a legal entity as a form of expression of some specific social relation, because the ideology of these jurists is limited by the views of their class." *Id.* 199.

40 Main works which are presently referred to in soviet law books: Bratus, "Problem of Legal Entity in Soviet Law," 3 Problems of Socialist Law (in Russian 1938) 42; Venediktov, Governmental Enterprise (in Russian 1928); *id.*, "Organs of Administration of Governmental Socialist Ownership" (in Russian 1940) Soviet State No. 5/6, 24–52: "The Governmental Legal Entities in the U.S.S.R." *id.*, No. 10, 62; *id.*, "The Right of Governmental Socialist Ownership," 1 Problems of Soviet Civil Law (in Russian 1945) 96; Shreter, Economic Law (in Russian 1928) 97; Genkin, "Legal Entity" (in Russian 1939) Problems of Socialist Law No. 1, 42. See also *infra*, notes 42, 45.

41 1 Civil Law (1944) 44.

an organization enjoying the status of a legal entity and embracing several governmental plants (production units). This appellation induced some soviet writers to explain the status of such organizations after the pattern of a fiduciary trust in Anglo-American law, somewhat confusing it with the industrial trust, the *Treuhand* of German law, and the *fiducia* of Roman law. The soviet State was visualized as the beneficiary (*cestui qui trust*) and the governmental *trest* as the trustee of the governmental property assigned (entrusted) to it.[42] The only difference seen was that the Anglo-American trust "is an agreement of several enterprises which entrusts, in one form or another, the business to the management created by them," while in the U.S.S.R. "the entrepreneur who unites plants and factories in a trust is always the same: it is the State that carries on business in the capacity of a public authority." [43] With the increase of planning and central control over the legal entities, a justified objection was made to this theory that the relationship between the government and its agency, which has the status of a legal entity, is in no way similar to the relationship between equals such as beneficiary (*cestui qui trust*) and trustee. The government may at any time withdraw the property from the legal entity; by assignment to its agency, regardless of the form in

[42] Martynov, Governmental Trusts (in Russian 1924); *id.*, "Principles of the Organization of Governmental Enterprises under Planned Circulation of Goods" (in Russian 1927) Law and Life No. 3, 39 *et seq.*; *id.*, Civil Law and Regulated Economy (in Russian 1927) 97–98; *id.*, "Contribution to the Problem of the Chartered Capital of the Governmental Trusts," 2 Industry and Law (in Russian 1926) 9 *et seq.*; Semenova, book review (in Russian 1927) Messenger of Soviet Justice No. 21/22, 777; Wohl, Die russischen Trusts (1925) 28; Lifman, "Trusts" im 7 Handwörterbuch der Staatswissenschaften (1928) 316; Bauer, Die rechtliche Struktur der Treste (1927) 264. For criticism, see Venediktov, The Legal Nature of Government Enterprises (in Russian 1928) 87 *et seq.*

[43] Martynov, *op. cit.* 10.

which the agency is organized, the government does not cease to remain and act as a public power. "A soviet *trest* is the State itself as a participant in civil commerce with a certain body of assets." [44]

Likewise, the theory that legal entities only have the management of governmental property, its ownership remaining with the State, was also rejected.[45] Venediktov, the most erudite, though occasionally obscure and always tedious writer, in 1928 arrived at the conclusion that "only recognition in the *trest* of the right of ownership in property assigned to it under the charter, as a special form of State ownership in the sphere of circulation of goods . . . may lead to a correct understanding of the external and internal relations of government industries." [46] In fact, the legislation of that period definitely recited elements of ownership among the powers of the *trest*. Thus, the statute on *trests* of 1927 (which is still in force) states that "the *trest* shall possess, use, and dispose of property." [47] Another act calls the circulating capital of governmental agencies engaged in business "their own capital." [48] The textbook of 1935 offered the following theory of "divided" and "split" ownership of governmental legal entities:

> The rule is: The united fund of governmental socialist property is divided into numerous parts, with these parts allocated to many governmental organizations operating on a commercial basis as their own property. . . . By virtue of this, the

[44] Venediktov, *op. cit.*, note 42 at 88 *et seq.*

[45] Dmitrevsky, "Evolution of Legislation on Foreign Trade" (in Russian 1923) Law and Life No. 1; Thal, Die Struktur der Wirtschaftsträger in der Russischen Gemeinwirtschaft (1925) Auslandsrecht No. 3, 79; Udintsev, The Russian Commercial and Industrial Law (in Russian 2d ed. 1923) 123. For criticism, see Venediktov, *op. cit.*, note 42 at 98 *et seq.*

[46] Venediktov, *op. cit.*, note 42 at 109.

[47] U.S.S.R. Laws 1927, text 392, Section 5. For translation, see Vol. II, No. 12.

[48] *Id.* 1931, text 316.

same property appears as the property both of the government and of separate governmental agencies . . . [and] may belong to two and even more "owners." For example, a state farm of some industrial enterprise may be the "property" contemporaneously of the government (the U.S.S.R., if the enterprise is of unionwide scale), of a trust, to which the enterprise belongs and of the enterprise. . . . In this case, the value of the property of the state farm (its fixed and circulating capital) will be entered at the same time in the balances of several organizations. . . .

Such is the unique legal construction of governmental socialist property: unified and at the same time divided; the property belonging to one owner, the proletarian State, and at the same time to many "owners"—its individual commercial agencies. . . . This construction has no analogy in capitalist law.

Division of governmental property among different governmental organs means also some "splitting up" among them of the rights of disposition and exploitation of governmental property.[49]

It is true that capitalist law does not provide for "divided" property any longer. But it was certainly known to feudal law. The entire preceding construction reminds one of medieval conceptions of the supreme or paramount ownership (*dominium directum seu eminens*) of the lord and the immediate ownership (*dominium utile*) of the tenant.[50]

The textbook of 1938 refrained from any detailed construction and stated simply that the right of a governmental legal entity to property assigned to its operations "is construed under soviet legislation similarly to

[49] Gintsburg, 1 Course 180, 181, 182.

[50] Dernburg, 1 Pandekten (8th ed. 1912) 471, note 14; *id.*, 1 Lehrbuch des preussischen Privatrechts (1879) 407; Hedemann, Sachenrecht des BGB (1924) 58, 59. See also Austrian General Civil Code, Sections 357–360 and the Prussian Landrecht, part I, title 18, Section 1 *et seq.*; Hedemann, *op. cit.* 27, 30, 59, 188 and Goldschmidt, Reichswirtschaftsrecht (1923) 139–140, attempted to apply the doctrine of divided ownership to the "socialization" of German industry under the Weimar Constitution.

the right of ownership." [51] But it seems that in 1944 the soviet jurists arrived at different conclusions. The textbook of 1944 states:

> Attempts to advance a construction of governmental ownership as being simultaneously unified and "divided" must be categorically rejected as an attempt of subversive nature. . . . By such construction government enterprises engaged in business and their interests are placed in opposition to the soviet State as a whole and as a holder of the interests of the entire socialist society.[52]

Professor Venediktov, who in 1928 had severely criticised the theory of mere management rights of legal entities, in 1945 upheld this very doctrine and discarded all others as "subversive" and "anti-Marxian."

> All these theories were exposed and rejected a long time ago. In contrast to them the principle is generally accepted in soviet legal writings of recent years that the socialist state is *the single and the only holder* (bearer) of the right of governmental socialist ownership and the separate portions of the united fund of governmental socialist property are transferred for management . . . and not in ownership to the government agencies concerned. . . .[53]

The textbook of 1944 presents the doctrine in the following terms:

> All government property constitutes a single fund belonging to a single and sole owner—the soviet State. Governmental organizations and enterprises are not owners of separate parts of government property, they are merely entrusted with the management of such parts. . . . The functions of management entrusted to governmental organizations include also functions of an operative nature, embracing to some extent the sphere of disposal of the government property. In the exercise of these functions government organizations perform various legal transactions. . . . If in the exercise of functions

[51] 1 Civil Law Textbook (1938) 184.
[52] 1 Civil Law (1944) 252–253.
[53] Venediktov, "The Right of Governmental Socialist Ownership" 1 Problems of Soviet Civil Law (in Russian 1945) 96–97.

as manager of a certain portion of government property entrusted to a government organization, it alienates, in virtue of its powers, some goods under a contract of sale or delivery to a co-operative organization or a citizen, then a transfer of ownership from the government to such co-operative organization or citizen takes place, and thereby the former governmental property becomes co-operative or personal private property. Vice versa, where a government organization acquires something, in the capacity of a managing agency and not as a separate owner, from a co-operative organization or a citizen, the co-operative or personal ownership is transformed into governmental ownership. In both these cases, transfer of title is effected.

However, if one government agency transfers property to another such agency, even under a contract of sale or delivery, no transfer of ownership takes place. The soviet State in the capacity of a single holder of the title to the entire fund of government property retains such title; only management passes from one government agency to another. . . . Capital goods, buildings, installations, enterprises, and their equipment are transferred from one government agency to another without payment by means of administrative acts redistributing the management of government property (U.S.S.R. Laws, 1935, text 221; *id.* 1936, text 93). Circulating capital and goods are transferred from one government organization to another by transactions of sale or delivery for payment of a compensation. However, even in this instance there is no alienation in the nature of a transfer of title, and the property is merely transferred from the operative management of one government organization to that of another. The peculiar feature of the last form of redistribution of management of government property is that here the principles of payment, of contractual penalties, and "control by ruble" are applied as a result of the fact that the activities of government enterprises are organized on a commercial basis.[54]

Described in such terms, the status of a government agency as a legal entity hardly differs from that of an ordinary government agency and makes the criteria of a legal entity rather elusive. In fact, the authors of the textbook of 1944 are of the opinion that more categories

[54] 1 Civil Law (1944) 251–252.

of government agencies should be classed with legal entities under the soviet law than are officially recognized as such by the soviet statutes. Thus, they class with legal entities agencies on government budget, the heads of which have the right to dispose independently of appropriations (e.g., individual ministries).[55] The authors of the textbook indicate the following elements of a legal entity: (a) it must be an organized unit defined by statute, bylaws, or a charter; (b) its property must be segregated; (c) it may independently incur financial liability; and (d) it may act in its own name. Yet, the definition in the Civil Code reads:

> 13. Legal entities are such associations of persons or such organizations or institutions as may, in their own name, acquire rights in property, assume obligations, and sue and be sued in court.

But, the textbook offered the following definition instead of that of Section 13 of the Civil Code:

> Legal entities are called such institutions, enterprises, and public organizations as appear in civil legal relations in their own name by virtue of a statute, charter, or bylaws, in the capacity of entities with segregated property, and independently bear financial liability for their obligations.[56]

This definition unquestionably offers a more accurate description of the status of a legal entity in the Soviet Union than the provisions of Section 13 of the Civil Code. But it also shows a departure from these provisions. The definite power "to acquire in their own name rights in property and assume obligations" is replaced by indefinite "segregation of property," and "independent financial liability." The express statement of the right to sue and be sued in court as an element

[55] *Id.* 161.
[56] *Id.* 140.

of status is omitted. If the definition continues to be generally accepted, Section 13 needs complete redrafting.[57]

7. Legal Status of the State

Earlier writers, notably Stuchka, rejected the necessity of treating the soviet State as a legal entity, because "what is the use of creating fiction where there is no need for it."[58] The textbook of 1938 is evasive on this point. It treats the State in a chapter dealing with legal entity, but terms its status indefinitely as that of "the only holder (*subiect*) of the right of government ownership."[59] An entirely new approach is to be found in the textbook of 1944. In this, a distinction is drawn between the soviet State as the owner of all economic resources, including those managed by governmental legal entities, and the treasury (fisc—*kazna* in Russian). The treasury is defined as "the soviet State acting as the direct owner of that part of the national income which is accounted for in the budget . . . acting in the capacity of the immediate administrator of government property not yet identified as property managed by a particular government agency."[60] Such meaning of the term treasury is a complete innovation. In Western European law, in the Russian presoviet law and in the soviet law thus far, the term treasury (fisc) was applied to the State when acting not as a sovereign but as a holder of private rights and obligations, primarily as a party to a contract.[61] Consequently, various

[57] The textbook suggests this by stating that there are more legal entities under soviet law than the statute recognizes, *id.*

[58] Stuchka, 2 Course (1931) 80.

[59] 1 Civil Law Textbook (1938) 82, 181.

[60] 1 Civil Law (1944) 157.

[61] Venediktov, *op. cit.*, note 57 at 90 *et seq.* and literature cited therein.

governmental commercial enterprises would come under this concept. The reverse is true of soviet law according to the textbook. Soviet governmental legal entities doing business are not a part of the soviet treasury, says the textbook, but similar organizations in capitalist countries are.[62]

The soviet State in its capacity as treasury is a legal entity but it is different from all other legal entities. "The State enjoys sovereignty; it is in itself the source of law; it is the State itself that calls all other legal entities into being and therefore certain rules are not applicable to the treasury, e.g., the rules concerning the special legal capacity of legal entities and those referring to their coming into being and termination, et cetera." [63]

The textbook of 1944 illustrates the new concept of the treasury in connection with transactions involving foreign trade and the liability of the soviet State thereunder.

> In transactions involving foreign trade, the U.S.S.R., in the capacity of a bearer of rights, acts as the treasury (fisc). The trade missions of the U.S.S.R. in foreign countries exercise abroad the rights belonging to the U.S.S.R. regarding foreign trade . . . therefore the treasury of the U.S.S.R. is liable under the obligations incurred by the trade missions (Section 6 of the Statute on Trade Missions). . . . A different situation arises regarding governmental quasi corporations organized for export and import. Transactions in foreign trade entered into by the soviet export-import enterprises (combines), which are permitted to appear in the foreign market, are binding only upon these enterprises. They act in their own name. Therefore, the soviet State does not bear any financial liability for legal transactions of these organizations except

[62] 1 Civil Law (1944) 157.
[63] *Id.* 156.

in cases where such liability was formally undertaken by a trade mission.[64]

The textbook remarks that some foreign courts tried to hold the soviet treasury responsible for transactions of the soviet export-import organizations, but "it met firm opposition on the part of soviet organs."[65]

One may surmise that the new highly artificial construction of the notion of "treasury" is intended to supply a theoretic foundation for the soviet point of view in such disputes.

8. Types of Governmental Enterprises

The original idea in organizing government agencies engaged in business in the form of legal entities—quasi corporations—was to grant such status not to individual productive establishments but rather to their combinations. Being particularly impressed by the efficiency of American big business, the soviets proposed to use its methods, to concentrate production processes, and visualized the corresponding legal entities after the pattern of the capitalist industrial trusts embracing several productive establishments.[66] The Russian word *trest*, the most commonly used term for a governmental legal entity operating on a commercial basis is, in fact, the English word "trust" spelled in Russian phonetically. It is used both in the first statute on this subject matter, of 1923, and in the second of 1927 (which is still in force with some amendments),[67] to designate a combination of several governmental plants (see Volume II, No. 12). However, since the Resolution of the Cen-

[64] *Id.* 158.
[65] *Id.* 159.
[66] Venediktov, *op. cit.*, note 42 at 85.
[67] For text, see *infra*, Vol. II, No. 12.

tral Committee of the Communist Party of December 5, 1929, on Reorganization of the System of Management of Industry,[68] individual establishments (plants, factories, et cetera) in many branches of industry were given the status of autonomous enterprises by being recognized as legal entities. Again, for a time several industrial trusts were united into "syndicates" and later "combines" (*ob'edinenie* or *kombinat*) for the purpose of joint marketing of their products.[69] Thus at present, an industrial establishment may have the status of a legal entity and be directly subordinate to a corresponding main bureau (*glavk*) of a ministry (commissariat prior to 1946), or may be included with other establishments in a *trest,* which, in such case, is the legal entity and is directly supervised by a main bureau. The first system is called by soviet writers the double link system (enterprise-bureau); the second, the triple link system (enterprise—*trest*—bureau). In some instances several *trests* are combined in a unit, and this is the so-called quadruple link sysem.

Kombinats (combines) to be found in some industries are either in the nature of a *trest,* or of a bureau of a ministry supervising the operation of a group of plants in a remote locality, as in the case of the oil industry and coal mining.[70] The status of ministries managing industries and their bureaus is somewhat complex. They are not legal entities, but some of their bureaus, in particular those engaged in marketing, or supplying, or both, since 1936 have been assigned to operate on a com-

[68] Collection of Material on Economic Administrative Law (in Russian 1931) 86; Pravda, December 14, 1929, No. 294.

[69] Statute on Syndicates, U.S.S.R. Laws 1928, text 129. They were liquidated in 1930 and replaced by combines which were reorganized in 1931–1934. 1 Civil Law (1944) 165.

[70] 1 Civil Law (1944) 166, 172.

mercial basis.[71] The status of such central bureaus "differs in essentials only slightly from that of a *trest*." [72] In fact, in 1940 some such bureaus were made *trests*, and some *trests* were made bureaus.[73]

Each legal entity, be it an autonomous establishment (plant), a *trest*, or a *kombinat*, operates on the basis of a separate charter approved by a corresponding ministry or the Council of Ministers. However, a pattern for these charters and an auxiliary source from which the gaps in a charter must be filled are provided by the legislation for *trests* and *torgs*, translated *infra*, in Volume II, Nos. 12 and 13.

There is a tendency to give more independence to a productive establishment included in a *trest*. In individual charters, their directors are given powers to make certain contracts; similar powers are provided for in special statutes. However, "the transformation of an establishment included in a *trest* into a legal entity has not yet been expressed in legislation." [74]

Thus, the status of a legal unity is far from being uniform in soviet law. With the general tendency toward central regulation and planning, the control of central government departments increases, and thereby the status of legal entities comes closer to that of government agencies "on the government budget." This also shows that the concept of a legal entity under the soviet law is a highly artificial construction. The status of a legal entity does not mean actual economic independence of an enterprise but merely a special method of finance, accountancy, and business operation. As ob-

[71] U.S.S.R. Laws 1936, text 361; 1 Civil Law (1944) 170.
[72] 1 Civil Law (1944) 171.
[73] *Ibid.*
[74] 1 Civil Law (1944) 166.

served by Venediktov in 1928, the legal entity is merely a masque over the government agency.[75] A recent characteristic of an agency operating on a commercial basis, given by the author of a soviet treatise on administrative law in 1946, states the same idea in a more veiled form:

> An agency assigned to operate on a commercial basis must carry out the assignments flowing from the governmental economic plan, the resolutions and orders of the Council of Ministers, as well as orders and instructions of ministers concerned, while the superior agencies, such as the Ministry of State Control, the State Planning Commission, and financial and banking agencies, supervise the execution by the economic agency of the directives and acts of government administration.
>
> Thus, the commercial basis is merely a special method of governmental management of the national economy, securing the execution of planned assignments on the basis of strictly delimited independence of the economic agency regarding its assets and operations, within the limits of the approved plans and established rules of conduct of business.[76]

9. Legal Entities Not Classed as Governmental Under Soviet Law

Under the Civil Code, the status of a legal entity is enjoyed by full partnerships (Section 295) and limited partnerships (Section 312). But at present, in view of the general policy of suppression of private enterprise, the pertinent provisions of the Civil Code are seldom if ever applied in the Soviet Union.

However, Section 126 of the Constitution (see *supra*, p. 391) allows the existence of "public organizations," which include the Communist Party, co-operatives, trade-unions, and "youth organizations, cultural, technical and learned societies," in other words, nonprofit organizations called in soviet terminology, "voluntary associations."

[75] Venediktov, *op. cit.*, note 42 at 71 *et seq.*
[76] Evtikhiev and Vlasov, Administrative Law (in Russian 1946) 36.

The status of the Communist Party in private legal transactions is neither defined nor discussed in soviet laws and legal writings. Thus, it is impossible to ascertain whether it enjoys the status of a legal entity, e.g., whether one may sue a Party committee for fuel delivered to its premises.

10. Trade-Unions

Trade-unions are considered legal entities because provisions of the soviet statutes defining their status expressly recite the elements of a legal entity. The textbook of 1944 comments:

> Trade-unions are the school of communism. . . . The most important task of the trade-unions is the political education of the toiling masses, their mobilization for building up socialism, and the defense of their economic interests and cultural needs. For the pursuit of these objectives it is necessary for the trade-unions to possess an adequate material basis and to be recognized as legal entities. . . . The decision respecting the foundation of one or another trade-union pertains to the jurisdiction of the All-Union Central Soviet of Trade-Unions.[77]

Another textbook emphasizes that:

> Formally, the trade-unions are not a Party organization but, in fact, they are carrying out the directives of the Party. All leading organs of the trade-unions (All-Union Central Soviet of Trade-Unions—V.Ts.S.P.S., The Central Committee of Trade-Unions, and others) consist primarily of communists who execute the Party line in the entire work of the trade-unions.[78]

From somewhat conflicting provisions of various statutes, soviet jurists deduce that only the central and regional agencies and not the smaller units enjoy the status of a legal entity. This status is enjoyed not by

[77] 1 Civil Law (1944) 190; 1 Civil Law Textbook (1938) 108–109.
[78] Denisov, Soviet Administrative Law (in Russian 1940) 60.

the trade-unions but, strictly speaking, by their agencies or committees.[79]

11. Voluntary Associations

This soviet term covers nonprofit organizations, such as literary, sporting, learned, and similar associations. During the period of Militant Communism, no law was enacted on the subject, and the prohibition of any association except those ordered by the government was simply implied. Several laws appeared during the New Economic Policy period requiring governmental license and yet containing rather general and, to an extent, liberal provisions.[80] But these laws were replaced by more strict rules in 1930–1932.

Among the new laws, the federal Act of January 6, 1930, merely restated the principle of governmental license and left the details to the legislation of individual soviet republics.[81] Commercial concerns, trade-unions, and religious associations were excluded from the category of nonprofit organizations and were made subject to special regulations (see *infra,* 12). In compliance with the federal Act of 1930, an R.S.F.S.R. law on voluntary associations, which may be considered a pattern for legislation of the other republics, was enacted on July 10, 1932, and is still in force. The following are the principal provisions of the law.

As stated in the preamble, the law was enacted "for the purpose of increasing the share of associations in the socialist reconstruction."[82] All previously organized

[79] Civil Law (1944) 190–191.

[80] R.S.F.S.R. Laws 1922, text 622, abrogated in 1928, *id.*, text 157; *id.*, 1924, text 626.

[81] U.S.S.R. Laws 1930, text 76, Section 2.

[82] R.S.F.S.R. Laws 1932, text 331. In the most recent available soviet law books this law is referred to as still being in force. 1 Civil Law (1944) 41; Zimeleva, Civil Law (1945) 192.

associations were required to be remodeled in accordance with the new law.

It is stated that these associations are "organizations of the toiling masses" and that they are organized for the purpose of "active participation in the building up of socialism in the Soviet Union as well as for assistance in strengthening the national defense" (Section 1). Accordingly, they "shall co-ordinate their activities with government planning in the sphere of national economy and of social and cultural reconstruction, and they shall participate actively in achieving the current goals of soviet power" (Section 3).

The founders and members of the associations must be citizens who have reached their eighteenth year and are not deprived of the right to vote for the soviets. Governmental institutions and public corporations may also be members (Section 4). "Voluntary associations cannot be organized for the purpose of protecting the legal or economic interests of their members, with the exception of cases specially provided for by law. They cannot be called trade-unions" (Section 8).

Depending upon the geographical limits of its activities, the constitution of a voluntary association must be confirmed by a local or a more central authority, such as various presidia or the people's commissariats (ministries since 1946) (Section 14).

When reviewing the constitution, these authorities must ascertain, besides the usual formalities: (a) whether the organization of the association is desirable; (b) whether the purpose of the association "conforms to the general purpose of the particular field of socialist reconstruction" to which the activity of the association relates. "They examine the membership and

are entitled to eliminate the founding members" at their discretion (Section 12 "a," "b," "v.").

The authority which confirms the constitution of an association is entitled to "supervise and control" its activities (Section 17). It is authorized "(a) to familiarize itself with all the affairs of an association by an immediate examination of its operations and by receiving periodical accounts and reports and (b) to give obligatory instructions in accordance with the constitution" (Section 18). Voluntary associations shall submit to the supervising authorities accounts and reports on their activities (Section 19). The supervising authorities are authorized to eliminate individual members or executive officers of the association, to dissolve prematurely the elected organs of the association and to take any other measures, including liquidation, "if the association violates the law or the general policy of soviet power as well as if it deviates from the purpose stated in the constitution" (Section 20).

The extent to which voluntary associations are governmental is evident from the fact that after the liquidation of some of them their property was given to government agencies (e.g., property of the *Avtodor* Society for Motoring, similar to A.A.A., in 1936) or to other organizations defined by the government (e.g., Society for the Promotion of Tourist Traffic which was liquidated in 1936 and its property given to trade-unions).[83]

A special category of associations includes the so-called unions of creative professions (artists, writers, musicians, and the like). These are authorized to protect the material interests of their members but are not

[83] 1 Civil Law Textbook (1938) 113; 1 Civil Law (1944) 194.

considered trade-unions. They are in fact devices for control over the arts and a machinery for promotion of trends corresponding to current plans of the government.

12. Status of Churches

Churches do not enjoy the status of a legal entity. Although since 1941 the soviet government has taken a new and more benevolent attitude toward the Russian Orthodox Church, the provisions of various laws which deprive the Church of the status of a legal entity and prohibit churches from owning property, making contracts, and the like, were not repealed. They are translated in Volume II, Part Seven.

13. Co-operatives

In the first period of the New Economic Policy, the co-operatives were regarded as a privileged form of private ownership. In fact, private businessmen made numerous attempts to conduct their enterprises under the disguise of co-operatives; as a result, special amendments were made to the Criminal Code barring such practices.[84] Moreover, the activities of co-operatives were brought under governmental supervision by making it mandatory that co-operatives join the territorial and nationwide unions. Instead of the term "legally established co-operative organizations" used in Section 57 of the Civil Code, the recently amended sections of the Civil Code afford a privileged status only to "co-operatives belonging to the system of co-operative organizations," i.e., to co-operatives which are members

[84] R.S.F.S.R. Criminal Code, Section 129[a] as enacted September 9, 1929, R.S.F.S.R. Laws 1929, text 705. The penalty is from two to five years imprisonment.

of such unions supervised by the government. Each co-operative must be admitted to membership in a local union of co-operatives, which unions, in turn, form regional, republican, and nationwide organizations. Only co-operatives included in this "system of co-operatives," i.e., subject to the approval and supervision of higher unions, enjoy that privileged status of co-operative ownership granted by certain provisions of soviet legislation.[85] Moreover, under the 1936 Constitution, "ownership of co-operatives" is no longer classed with private ownership but constitutes, together with government ownership, a specially protected category of "socialist ownership."

For several types of co-operatives, the control exercised through their nationwide unions has been replaced by government agencies. Thus, in the case of collective farms, which are officially classed with co-operatives, control is exercised by the governmental machine-tractor stations (M.T.S.) and the Ministry of Agriculture, a special union (*Kolkhoztsentr*) having been abolished. Central unions of producers' (industrial) co-operatives were dissolved in 1941, and the councils of ministers of the republics and the regional executive committees were put in charge of the management of the producers' co-operatives.[86] No federal body was assigned this task until November 9, 1946, when a main bureau was created directly under the federal Council of Ministers, to take care of the producers' and consumers' co-operatives on a unionwide scale.[87] In 1945, the whole system of remuneration of executive, technical, and

[85] Civil Code, Sections 52, 57, 59, 71; U.S.S.R. Laws 1929, text 462; 1 Civil Law (1944) 177 *et seq.*, 181 *et seq.*

[86] U.S.S.R. Laws 1941, text 40, Section 2.

[87] Resolution of the Council of Ministers of November 9, 1946, No. 2445, Evtikhiev, *op. cit. supra,* note 76 at 28.

clerical personnel of the co-operatives was subjected to regulation after the pattern of governmental enterprises, and application of governmental rates became mandatory.[88] Thus, the co-operatives are in fact completely controlled by the government but differ from governmental enterprises in that those who work in them have shares but are paid only for contribution in labor.

In addition to collective farms, which are subject to special rules dealt with in Chapters 18 through 21, and which can hardly be defined as co-operatives, soviet law regulates fishermen's collectives, co-operatives of artisans,[89] and consumers' co-operatives.[90] Fishermen's collectives are modeled after the pattern of a collective farm.[91]

"The basic task of productive co-operatives," says the soviet textbook, "is the conduct of collective business (trade) on the bases of collective work and collectivization of the instruments of production, as well

[88] U.S.S.R. Laws 1945, text 98, Section 33 and appendices to this act.

[89] Basic acts concerning producers' co-operatives:

Statute on Producers' Co-operatives of May 11, 1927; U.S.S.R. Laws 1927, texts 280, as amended, and 372; *id.* 1931, text 148; *id.* 1932, texts 340, 345, 379; *id.* 1933, texts 248, 443; *id.* 1936, text 327; *id.* 1940, text 61; *id.* 1941, text 40; *id.* 1945, text 98.

[90] Basic acts:

Statute on Consumers' Co-operatives of May 20, 1924, R.S.F.S.R. Laws 1924, text 645, which is quite out-of-date; U.S.S.R. Laws 1935, text 427; *id.* 1936, text 190; and resolutions of the *Tsehtrosoiuz*—the Central Union of Consumers' Co-operatives. A standard charter of a village consumers' co-operative was approved on January 25, 1939 (1939) Financial and Economic Legislation No. 10/11, 22. Zimeleva, Civil Law (1945) 39; 1 Civil Law (1944) 179; Statute on Co-operatives of Invalids, R.S.F.S.R. Laws 1934, text 101; *id.* 1941, text 16; Model Charter of an Artel of Invalids approved by the R.S.F.S.R. Ministry of Social Security of January 17, 1944; Building Co-operatives, R.S.F.S.R. Laws 1939, text 43.

The so-called co-operatives of invalids organized for employment of handicapped persons, primarily disabled war veterans, form a special type of co-operatives (see also Chapter 22). Co-operative housing, largely discontinued in 1937 (see Vol. II, No. 2, comment to Section 179), was subjected to new regulations in 1939, R.S.F.S.R. Laws, *ibid.*

[91] Standard Charter of a Fishermen's Artel, U.S.S.R. Laws 1939, text 90. See also U.S.S.R. Laws 1936, text 263 a-b.

as socialist reeducation of former small-scale owners, craftsmen, and artisans." [92] Therefore, all members of a productive co-operative must participate in the work by personal labor; close relatives may not be members of the same co-operative; income is distributed according to contributions of labor and not by shares; and shares may not be transferred or inherited. If a member dies, his heirs are paid but may not take over his share.

[92] 1 Civil Law Textbook (1938) 101.

Chapter 12

Contracts in General

The soviet law of contracts evolved from the efforts of the soviet legislators and jurists to use within the framework of socialist economy the concept of contract as developed in the civil law countries. Therefore, a person schooled in Anglo-American legal theory must be prepared to sustain a double handicap in studying the soviet law of contracts. On the one hand, the Continental European law of contracts, which is the starting point of the development of the soviet theory of contract, deviates from basic concepts of Anglo-American law. On the other hand, the notion of a contract as outlined in the Civil Code no longer covers, in reality, all ramifications of contract in soviet law, in particular contracts between government agencies engaged in industry and commerce. But the concepts implied in the provisions of the Civil Code have not been totally abandoned, and it seems appropriate, therefore, to begin with a consideration of those concepts.

1. Legal Transactions and Contracts

In outlining the law of contracts, the framers of the soviet Civil Code followed certain theoretical constructions of European law, of German law in particular, as developed by Professors Shershenevich, Gambarov, and Korkunov, the Russian prerevolutionary legal writers of renown.[1] Since these constructions have been taken

[1] Shershenevich, 1 Textbook of the Russian Civil Law (in Russian 11th ed. 1915) 86, 190; Gambarov, 1 Course in Civil Law (in Russian 1911) 632; Korkunov, General Theory of Law (in Russian 7th ed. 1907) 161 *et seq.*, English translation by Hastings (1922) 167 *et seq.*

over by soviet jurisprudence,[2] they are stated here in brief; this will also explain the terminology and arrangement of the provisions on the law of contracts and torts in the soviet Civil Code.

Events capable of producing legal effects (legal facts) are visualized as being either events independent of the will of persons whose rights or duties they affect—events in a narrow sense—or human acts. Thus, death which opens succession, the burning of an insured building which gives rise to the claim for insurance, lapse of time which bars a suit—all are legal events in a narrow sense. Now, human acts may be undertaken without the intention to cause the effect which the law nevertheless attaches to it, or may be expressly directed towards causing a certain legal consequence, to which intention the law may give full effect. Contracts fall among such human acts as are directly designed to bring about certain legal effects, viz., to establish, modify, or terminate rights and obligations. But while a contract requires at least two contracting parties, a concurrence of at least two wills, there are instances where the expression of a single will is under the law sufficient by itself to produce legal consequences. Thus, notice by the landlord terminates his relation with the tenant occupying premises under a lease for an indefinite period; renunciation by the heir of his share extinguishes his succession rights. In other instances, a unilateral expression of a single will produces the contemplated legal effect only if accompanied by a legal event. This is the case of a testament which produces its effect—testate succession

[2] Agarkov, "The Concept of a Legal Transaction under the Soviet Law" (in Russian 1946) Soviet State No. 3/4, 41 *et seq.*; 1 Civil Law Textbook (1938) 138; 1 Civil Law (1944) 62–72, 89; Zimeleva, Civil Law (1945) 11–12, 45.

—only upon the death of the testator. While, in the Anglo-American law, contracts are not combined with such legally relevant expressions of a single will under a generic concept, the doctrine of the civil law, followed by the soviet law, employs a generic expression serving this purpose. Thus, "legal transaction" (*negotium iuris*)[3] is a generic term designed to unite, as two species, both contract as the legally relevant concurrence of at least two wills and the legally effective expression of a single will.[4] The terms bilateral and unilateral are used in this connection, in Section 26 of the soviet

[3] *Rechtsgeschäft* is the term used in the German Civil Code; the term *acte juridique* is used by the French legal writers Planiol, Colin et Capitant, Josserand, Demogue. See especially Saleilles, Déclaration de Volonté (1906).

[4] There are human acts other than legal transactions that cause legal consequences. Characteristic of a legal transaction, and contract in particular, is that the parties to it directly desire the legal effect flowing therefrom. Vendor and purchaser seek to transfer title; the testator to bequeath his property. But in some instances, the law attaches to an act a consequence not contemplated by the actor. This is true of an unlawful act (tort), because, although the tortfeasor may have intended to inflict the injury, he probably did not desire to bring about the legal consequence thereof, viz., his liability for damages. The effect not intended may also result by operation of law from a lawful act. Thus, under the soviet law, a finder of lost property acquires, by the act of finding, a right to remuneration (Section 64 *et seq.*). The author of a work of art acquires copyright by the fact of its creation. Moreover, acts of public authorities (administrative acts) and certain kinds of judicial decisions establish private rights and obligations. The soviet textbook of 1944 emphasizes that "under the planned socialist economy, administrative acts as bases of civil legal relations are of great importance." (1 Civil Law (1944) 65). Thus, the variety of legally relevant facts may be presented in the following scheme, partly derived from the soviet textbook (*id.*):

Legally relevant facts are either events independent of human will (legal events) or human acts.

Human acts are either lawful or unlawful.

Lawful acts embrace (a) legal transactions which may be either unilateral or bilateral, called contracts; (b) acts of authorities, administrative or judicial; and (c) unintentional acts which result in legal consequences by operation of law.

Unlawful acts may result only in punishment or in liability for damages or in both. When treated from the point of view of damages, they are torts.

Code in particular, in a meaning somewhat different from that of the Anglo-American law, viz., to denote whether two wills or a single will is the constitutive element of a legal transaction. A legal transaction formed by a single will (e.g., testament, notice, renunciation of a right) is called unilateral, while contracts formed by the meeting of at least two minds are called bilateral legal transactions. But, as in Anglo-American law, contracts themselves are subdivided into bilateral contracts, in which the obligations of both parties are mutual, and unilateral contracts, under which all the obligations arise for one party and all the rights for the other.[5] Thus, the term bilateral is applied to a legal transaction to denote simply a contract of any kind, while, when applied to a contract, it denotes a contract establishing mutual obligations of both parties thereto (e.g., sale).

2. Law of Contracts in the Civil Code

Visualizing contracts as a species of the generic concept of legal transaction, the framers of the soviet Civil Code covered a portion of the law of contracts by a body of general provisions equally applicable to all legal transactions, including contracts (Sections 26–43), and placed these provisions in the introductory General Part of the Code. Here such subject matters are treated as form (Sections 27–29), illegality (Section 30), capacity (Section 31), duress (Section 32), necessity (Section 33), pretended transactions (Sections 34–35), invalidity (Sections 36–37), contracts made through an agent (Sections 38–40), and conditions (Sections 41–43). Of all these provisions, only those of Section 30 depart from

[5] Civil Code, Section 139, Note.

the standards of nonsoviet laws; these are discussed *infra* under 5. Unilateral legal transactions play a smaller role than contracts, and therefore the importance of these provisions lies mainly in the fact that they are part of the soviet law of contracts. But another part of the Civil Code must also be examined to obtain a complete picture of the provisions governing the law of contracts. The framers of the Code segregated into a separate part of the Code, under the heading Law of Obligations, provisions dealing with obligations in general, regardless of the grounds from which they arise, whether contract, tort, or any other (Sections 106–129), general provisions concerning obligations arising from contracts (Sections 130–151), provisions respecting individual contracts, viz., lease, sale, barter, loan, independent contracting, suretyship, agency, power of attorney, contract of commission, partnership, and insurance.[6] A separate chapter in the same part deals with unjust enrichment and another with torts.[7] Thus, with the exception of these two chapters, the whole of the Law of Obligations deals in fact with the law of contracts.

3. Obligations Arising from Contract

The Civil Code defines contract in conjunction with legal transactions in general. The pertinent section reads as follows:

> 26. Legal transactions, that is to say, acts intended to establish, modify, or terminate civil legal relations may be unilateral or bilateral (contracts).

[6] Lease, Sections 152–179; sale, Sections 180–205; barter, Sections 206–207; loan, Sections 208–219; independent contracting, Sections 220–235; suretyship, Sections 236–250; agency, Sections 251–263; power of attorney, Sections 264–275; contract of commission, Sections 275 a–y; partnership, Sections 276–366; and insurance, Sections 367–398.

[7] Unjust enrichment, Sections 399–402; torts, Sections 403–415.

Thus, a contract is a bilateral legal transaction "intended to establish, modify, or terminate civil legal relations." The concept of civil legal relations, which is not defined in any soviet statute, is discussed by soviet legal writers from two angles. The socio-economic nature of these relations is analyzed with the theoretic purpose to present the legal concept in the light of the Marxian doctrine as a "legal superstructure" upon the "economic basis." [8] However, the discussion implies certain practical consequences. The salient portion of the discussion is as follows:

> Civil legal relations are a superstructure upon the human relations of production of commodities. Legal relations being a kind of social relation are in the long run based upon the relations of production of commodities but are not merged with them. Relations of production, in order to take the form of legal relations, must obtain recognition by legislation. In creating the rules of law, the State (ruling class) shapes productive and other social relations, not in a passive manner, but by actively reacting on them. In a socialist society, where there are no conflicts between productive forces and productive relations . . . the possibility of such a reaction by the State is in principle different from and much greater [than in a capitalist society].[9]

Regarding the theoretical aspect of the statement, it may be noted that there are civil legal relations which it is very difficult to conceive of as a superstructure upon the relations of men in the production of commodities. This may be true of certain property relations, but the relations of parent and child, husband and wife, guardian and ward, and the like, do not fit this scheme. However, the practical implication of this statement is in the emphasis placed upon the possibility of the interference of the State with private rights in a socialist society,

[8] Chapter 5, note 33.
[9] 1 Civil Law (1944) 66.

i.e., in the Soviet Union. It is characteristic that the textbook of 1938, which outlines in the main the same philosophy as its successor, stated nevertheless that "a characteristic feature of civil legal relations is a measure of freedom, independence, and initiative recognized to a degree for all the participants in these relations." [10] The textbook of 1944 does not contain any statements of that kind. The active role of the State is emphasized instead. The textbook admits that civil legal relations include an element of will but emphasizes the supremacy of the State over the will of the parties thereto.[11]

In discussing the term, "civil legal relations," from a strictly legal point of view, soviet jurists accept in the main the concept developed by the prerevolutionary Russian writers who followed the theory of the Western (Romanistic) civil law in defining a civil legal relation as a social relation implying a bond of private right and obligation.[12] Thus, the 1944 textbook states:

> A civil legal relation is a social relation, that is to say, a relation between men which establishes their rights and obligations.[13]

Substituting this concept in the clause of Section 26, legal transactions in general may be defined as acts intended to establish, modify, or terminate private rights and obligations. Accordingly, a contract is defined as a bilateral legal transaction, i.e., an act of agreement of at least two wills intended to establish, modify, or terminate private rights and obligations. Again, the legal notion of an obligation and the grounds from which it

[10] 1 Civil Law Textbook (1938) 10.
[11] 1 Civil Law (1944) 67.
[12] Shershenevich, *op. cit.*, note 1 at 83; Korkunov, *id.*; (American ed.) at 167 *et seq.*, (Russian ed.) 139 *et seq.*
[13] 1 Civil Law (1944) 69.

arises are defined in the soviet Civil Code in line with the civil law jurisprudence [14] as follows:

[14] For the sake of comparison, the following representative definitions are referred to:

Roman Law.

Obligatio est juris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis jura. Inst. 3, 13 de oblg., pr.

Obligationum substantia non in eo consistit, ut aliquod corpus nostrum, aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum. Paulus, lib. 2 Inst., D 44, 7, 3.

French Civil Code of 1805.

1101. A contract is an agreement by which one or several persons undertake an obligation to give, to do or not to do something for one or several other persons.

1126. The purpose of any contract is something that one party is obligated to give or to do or not to do.

Austrian General Civil Code of 1811.

859. Personal rights involving property by virtue of which one person is obligated to a performance for another are founded directly upon the law or a legal transaction or an injury sustained.

German Civil Code of 1900.

241. By virtue of obligation, the creditor is entitled to demand a performance from the debtor. The performance may consist of an act of omission.

Louisiana Civil Code.

Art. 1757 § 3. A civil obligation is a legal tie which gives the party with whom it is contracted the right of enforcing its performance by law.

Art. 1761. A contract is an agreement by which one person obligates himself to another to give, to do, or permit or not to do something expressed or implied by such agreement.

California Civil Code.

1427. An obligation is a legal duty by which a person is bound to do or not to do a certain thing.

1428. An obligation arises either from
one—the contract of the parties, or
two—the operation of law.

Polish Code of Obligations of 1933.

Art. 1. Obligations arise from declarations of will or other acts and other occurrences to which the laws attach the origin of obligations.

Art. 2, § 1. The essence of the obligation consists in the duty of the debtor to perform for the creditor.

§ 2. The performance may consist of giving something, of doing or not doing something, or abstaining from or permitting something.

Italian Civil Code of 1942.

1173. *Sources of obligations.*

Obligations arise from contracts, wrongful acts or any other acts or facts which are capable of producing obligations under law.

1174. *Property value of performance.*

The performance which constitutes the object of an obligation must be of a nature allowing economic evaluation and must satisfy the interest of the creditor even though such interest be not related to property.

106. Obligations arise from contracts and on other grounds stated by law, in particular in consequence of unjust enrichment and the causing of injury to another.

107. By virtue of an obligation, one person (creditor) has the right to claim from another person (debtor) the performance of a specific act, in particular, to deliver things or to pay money, or to abstain from an act.

Slight differences in the language of these sections in comparison with corresponding passages of some other European codes is explained by the fact that the framers of the Civil Code followed closely the formulae of the Russian imperial draft of 1913.[15] The opening clause of Section 106, "obligations arise from contract and on other grounds stated by law," is taken verbatim from this source, and the concluding clause is in the nature of a mere illustration. Apparently the framers of the soviet Code shared the view of the compilers of the draft that it is useless and impossible to enumerate in a statute all the possible reasons which may give rise to an obligation. Likewise, an obligation does not have to be of economic value to be enforceable under soviet law, as is, for instance, required under the Austrian and Italian codes.[16] However, at present, the soviet jurists think that the formula of Section 106 is "out-of-date." It is true that, by referring to "other grounds stated by law," it covers in a general way the specific grounds existing in the Soviet Union. "However, the formula does not reflect sufficiently the characteristic features of the soviet law at the present phase of its development.

[15] Imperial Russian Draft of a Civil Code of 1913.

1567. An obligation is a legal duty of a person to deliver a thing or to perform an act or to abstain from performance of an act.

1568. Obligations arise from contracts and other grounds established by law.

Saatchian, compiler, 2 Civil Code, a draft . . . with comments (in Russian 1913) 172–174.

[16] See *supra*, note 14.

Thus, it fails to mention the acts of planning and regimentation of national economy" [17] as a ground from which an obligation may arise. Such acts of planning may establish the obligation of one party to deliver to the other party some goods, to pay a sum of money, to construct a work, or render some services. Such acts may also impose the duty to make a contract or to give an order which is then mandatory upon the other party. This procedure is established, for instance, for delivery of goods for export under the Act of October 3, 1940 [18] and for delivery of ferrous metals.[19] The wide range thus assigned to acts of planning raises the general problem of the relationship between plan and contract in soviet law. Before discussing it, the essentials of a contract must be stated.

4. Elements of a Contract

In contrast to the Anglo-American law but in line with the Roman law, the soviet law of contracts contains no requirement of consideration. Under Section 130 of the soviet Civil Code, a contract is deemed made and enforceable "when the parties have expressed to one another—in proper cases in the form required by law—their agreement in all essential points thereof." The concurrence of the wills of the parties is the basic element of the contract. The parties must be legally competent (Section 31), and their will must be serious, not for pretense only (Sections 34, 35). Contracts made under the influence of fraud, threat, violence, mistake, or a fraudulent agreement between the agent of one

[17] 1 Civil Law (1944) 296.
[18] U.S.S.R. Laws 1940, text 636.
[19] General conditions of delivery of ferrous metals of November 29, 1938; Arbitration in Soviet Economy, Collection of Laws (in Russian 1941) 222.

party and the other party may be invalidated in full or in part by the court on complaint of the aggrieved party (Section 32).

Far from introducing consideration as an element of contracts, the soviet law gives, nevertheless, a party who "under the pressure of distress" has concluded a contract "clearly unprofitable to him" the right to sue in court for invalidation of the contract or to preclude its operation in the future (Section 33). Such action may also be brought by the district attorney, government agency, or a social organization, in particular regarding contracts made by families of men in the military service (*id.*).

If a contract is invalidated as one made by a legally incompetent person, the parties must return to each other whatever was received under the contract, and the incompetent party may claim damages sustained as a result of the contract (Section 148).

In the case a contract is invalidated by reason of fraud, violence, threat, or distress, the aggrieved party may recover from the other party whatever was delivered to him. The other party has no such right. It is a particular feature of the soviet law of contracts that, in case of unjust enrichment, what the aggrieved party may obtain as a result of the recovery is forfeited to the State (Section 149). In cases of invalidity of a contract because of noncompliance with requirements of form or because of mistake, the *status quo ante* is restored, but the party who caused the mistake is liable for damages (Section 151). If a contract made under distress is rescinded only as to its operation in the future, the aggrieved party may recover only that part of the bargain performed by him for which he did not receive

counterperformance up to the time of rescission (Section 150).

In case of a bilateral contract each party has the right to refuse performance of his promise until the other party performs his counterpromise, unless the law, contract, or essence of the mutual relationship implies a duty to perform his obligation prior to performance by the other party (Section 139).

5. Contracts Prejudicial to the State

The compilers of the soviet Civil Code were definitely instructed by Lenin "to enlarge the interference of the State with the relations pertaining to 'private law' and to enlarge the right of the government, to annul, if necessary, private contracts . . . ."[20] In fulfillment of this aim, Section 1 of the Civil Code declared a conditional protection for private rights in general, which is discussed in Chapter 9, I. But in addition, with special reference to contracts, the following two sections were included in the Civil Code.

> 30. A legal transaction made for a purpose contrary to law, or in fraud of law, as well as a transaction directed to the obvious prejudice of the State, shall be invalid.
>
> 147. In the event the contract is invalid as one contrary to law or directed to the obvious prejudice of the State (Section 30), none of the parties shall have the right to claim from the other the restoration of that which such party has performed under the contract.
>
> Unjust enrichment shall be collected for the benefit of the State (Section 402).

The particular feature of the soviet law of contracts lies in the concluding clause of Section 30 and in the provisions of Section 147. Any legal system deprives of legal effect contracts contrary to law or in fraud of

[20] Lenin, 29 Collected Works (in Russian 2d ed.) 419.

law. But the provisions of Section 30 go further, furnishing the possibility of invalidation of a contract that is legal in itself and has a legal purpose but "is directed to the obvious prejudice of the State." This clause was directly designed to guard during the New Economic Policy against undesirable growth of private business. Section 147 established, as a penalty additional to invalidation, not only that none of the parties shall have the right to recover from the other whatever such party has performed under the contract but also that the unjust enrichment shall be collected for the benefit of the State. Thus, whatever was delivered by one party to another in performance of such transaction reverts to the State.

It is interesting to follow the application of these provisions by the soviet courts. In the first years after the Code became effective, the lower courts seem to have tried to interpret these sections rather liberally, but the R.S.F.S.R. Supreme Court adopted a more restrictive attitude toward the application of these sections in 1926. Thus, the court ruled:

> In view of the basic proposition that only such transactions are invalid as were prejudicial to the State when made, the court has deemed it improper to apply Section 30 to legal transactions which have become detrimental to the State in the course of performance. The court has held that Sections 30 and 147 may be applied only in cases where the legal transaction was directed to the obvious prejudice of the State at the very time of its making, e.g., by insertion of terms obviously detrimental to the State or by omission of clauses necessary for the protection of the interests of the State.
>
> For these reasons, the court has set aside a decision which rescinded a contract for the rent of a mill because the contract, though not detrimental when made, tended later to incur a loss for the State, and a decision made in 1922 rescinding the renting of premises merely because this became unprofitable under 1923 and 1924 prices.

The Civil Appellate Division of the R.S.F.S.R. Supreme Court has explained to the courts that Section 30 may not apply to transactions prejudicial to public organizations but that, on the other hand, a restricted interpretation of the term "State" which appears in Section 30 is unfounded. This section may apply not only to legal transactions which are prejudicial to the State as a whole, but also to transactions calculated to prejudice individual government agencies.[21]

Another decision of the same court sought also to restrict the application of this section from another angle:

> Section 30 was used from the very first effective date of the Civil Code for the relentless combat of any kind of malicious and speculative transactions, in particular, transactions involving houses which remain in private ownership and efforts to restore and fortify by such transactions prerevolutionary civil relations. In the subsequent period, the Civil Appellate Division of the Supreme Court held that Section 147 does not necessarily apply to each and every legal transaction violating Section 30, and in individual cases the court found it possible, in the absence of any malice, speculation, or conscious violation of the law, to apply Section 150, with its restoration of the *status quo ante* and mutual cancellation of the performances of the parties.[22]

Thus, it seemed that the application of Sections 30 and 147 was doomed. However, a new and quite unexpected field for their application has recently been opened.

Although Sections 30 and 147, especially the latter, were designed as watchtowers over private contracts that might defeat the policy of the socialist State, they have appeared since 1939 in a new light, as offering methods of effective control over governmental business. A recent (1945) monograph by Novitsky, a soviet professor of law, comments:

[21] R.S.F.S.R. Supreme Court, Civil Appellate Division, Report on Work in 1926; Nakhimson, Commentary 126–127; 1 Civil Law (1944) 96.
[22] *Id.*, Decision No. 33372 of 1925; Nakhimson, Commentary 129.

Until recently Sections 30 and 147 were applied exclusively in the sphere of activities of individuals. There was no place for their application in cases where both parties to a contract were socialist enterprises or institutions (governmental, co-operative, or public). The Plenary Session of the R.S.F.S.R. Supreme Court ruled on May 16, 1927, precisely that the provision of Section 147 requiring forfeiture to the treasury of the unjust enrichment of the party who received performance should not apply in cases between governmental or co-operative organizations. Consequently, it was understood that Section 30 was designed for individual citizens only. Besides, the R.S.F.S.R. Supreme Court put forward the internal element [as the reason for invalidity of the transaction], viz., the intention to violate or bypass the law. The Ukrainian Supreme Court in an analogous ruling stressed the motives of business expediency and social standing of the parties.

However, life has gone on in its own way and shown that commands of law are violated not only by individual citizens but also by organizations, which situation called for suppression of such phenomena. From year to year, the necessity of applying Sections 30 and 147 also to contractual relations between governmental and co-operative organizations has become increasingly evident.

The practice of government arbitration has pierced the wall by which the R.S.F.S.R. Supreme Court separated socialist organizations from Section 147. On the ground of the Resolution of the U.S.S.R. Council of People's Commissars of December 19, 1933,[23] of which Section 15 declared invalid contracts violating fixed prices and Section 23 declared that contracts made contrary to governmental plans and decisions shall be rescinded or modified by the arbitral agencies, the practice of arbitration took the following course. If performance of the contract is essential, and if it is possible to bring the contract into accord with the requirements of law, the arbitral tribunal chooses this course and modifies the contract accordingly. If the matter cannot be remedied by modification of the contract, the arbitral tribunal declares the contract invalid with reference to Section 30 and applies the legal consequences specified in Section 147. . . .

Moreover, the arbitral tribunals have based their decisions

[23] Concerning the Making of Contracts for the Year 1934, U.S.S.R. Laws 1933, text 445.

of the problem upon such objective elements as the importance of the violation of the law or the plan, the extent to which a given illegal transaction was used in making contracts, the damage caused to the State by the contract, whether such transactions were casual or continuously repeated, et cetera. In all such cases, the arbitral tribunals permitted the application of Sections 30 and 147.[24]

The U.S.S.R. Supreme Court concurred in this point of view in the following ruling of the Plenary Session of July 16, 1939:

> Section 147 of the Civil Code states that, where a contract is invalid because it is against the law or tends to the obvious prejudice of the State, no party to such contract is entitled to recover whatever he has performed under contract, and the unjust enrichment shall be forfeited to the revenue of the State.
>
> However, despite the direct indication of the statute, the courts have failed in a number of cases to apply this rule to legal transactions between institutions and enterprises of the socialist economy. In particular, the Resolution of the Plenary Session of the R.S.F.S.R. Supreme Court of May 16, 1927, expressly ruled that the legal consequences under Section 147 of the Civil Code are not applicable in cases where both parties to a contract are governmental institutions, or where one party is a governmental institution and the other party is a cooperative organization.
>
> Such practice is erroneous because it is contrary to the aim of fortifying socialist legality and the principle of the commercial basis in the mutual business relations of institutions and enterprises, and may promote the making of illegal transactions which secure the pecuniary interests of the parties to such transactions.
>
> In view of the foregoing, the Plenary Session of the U.S.S.R. Supreme Court has ruled:
>
> (a) The judicial bodies are hereby instructed that Section 147 of the Civil Code shall apply also to legal transactions the parties to which are governmental or public institutions or organizations;
>
> (b) All decisions of judicial bodies contrary to the present resolution, in particular the Resolution of the Plenary Session

[24] I. Novitsky, "Invalidity of Legal Transactions" 1 Problems of the Soviet Civil Law (in Russian 1945) 40, 41.

of the R.S.F.S.R. Supreme Court of May 16, 1927, shall be considered noneffective.[25]

6. Statute of Frauds

In order to supervise private contracts, the soviet Civil Code requires many contracts to be notarized or made in writing. Notaries public are government officials in the Soviet Union, and the notarization of a contract means that it must be executed in the office of a notary public, certified by him, and entered upon the record. The failure to comply with the prescribed form invalidates the contract, if this is expressly provided for by law (Section 29). In some instances, e.g., contracts of 500 rubles or more in value, an oral agreement is not a nullity in itself, but the parties may not prove the contract by witnesses and must present written evidence thereof (Section 136, Note). Contracts which must be in writing or notarized, as well as the consequences of noncompliance with the prescribed form, are enumerated in the comment to Section 29 of the Civil Code (see Volume II).

The strict requirements of law respecting form of contract have been to a large extent moderated by the soviet courts. By a ruling of the R.S.F.S.R. Supreme Court of 1927, the courts were instructed to treat more leniently contracts "not involving anything illegal or any obvious prejudice to the State," even if they were not notarized as required by law. If such a contract has been performed wholly or in the major part, the court may recognize it as valid in the interest "of the parties who are toilers," and may require the party concerned

[25] (1939) Soviet Justice (in Russian) No. 14; Civil Code (1943) 179; Novitsky, *op. cit.* 42; Zimeleva, Civil Law (1945) 51; 1 Civil Law (1944) 104.

to notarize the contract within a period of time fixed by the court. In cases where the form is not prescribed by law but stipulated, such stipulation must be treated by the court as a condition. The contract may still be recognized as valid if one of the parties intentionally has prevented the execution of the stipulated formalities, or a subsequent waiver of formalities may be deduced from the facts of the case, or if the contract, in essential parts, has been performed by one party and the other raises formal objections only after the contract has become unprofitable.[26]

7. Contract Versus Plan in the Socialized Sector of Economy

After the above survey of the main features of contract as outlined in the soviet Civil Code, the discussion of contract in soviet law in general may be resumed.

The provisions of the Civil Code are not at present the only source of the soviet law on contracts. The soviet Civil Code was compiled in 1922, when its framers had no clear idea of the role which contract, as a method of establishing rights and obligations by the free will of the parties, would play within the framework of a soviet socialist planned economy.[27] They outlined the rules of the law of contract in terms and after the pattern of capitalist codes, inspired by the modern doctrine of Roman law.[28] The leading soviet jurists of that time looked at the pertinent provisions of the Civil Code as an obvious borrowing from capitalist law, essentially opposed to the planned socialist economy yet justi-

[26] R.S.F.S.R. Supreme Court, Civil Appellate Division, Letter of Instruction, 1927 No. 1, Civil Code (1943) 149, translated in full in comment 3 to Section 29 of the Civil Code.

[27] Compare Chapter 1, III, Chapter 9, II.

[28] In particular, German and Swiss.

fied to the extent that it was necessary at the time to permit a limited return to capitalist private enterprise.[29]

With the advent of the Five-Year Plan in 1929, when the whole of the soviet economy began to be transformed on a socialist basis and private enterprise of any consequence was barred, some soviet jurists expected the end of the law of contracts. They visualized the coming soviet civil law as consisting of two sets of laws, one for relationships between citizens, for which the provisions of the Civil Code should remain in force, and another for relationships among the government agencies engaged in business—an "economic administrative law" based upon the planned economy and excluding free contract.[30] This program never was effectuated in this form; it was rejected and condemned as an unfounded attempt to destroy the unity of the socialist legal system of the Soviet Union.[31] The provisions of the Civil Code remained as they were, couched in general terms suggesting their universal application. Contract, as a form in which business relations among the economic government agencies are expressed, was retained.[32] Thus, relations involving delivery of goods, performance of work, and rendering of services among government agencies must be regulated by means of contracts.[33] But

[29] Stuchka, 3 Course 4 *et seq.*; Kantorovich, The Legal Basis of the Economic System of the U.S.S.R. (in Russian 1925) 11; Malitsky 22, 23. See Chapter 5.

[30] Basic Principles of the Civil Legislation of the U.S.S.R., a draft edited and prefaced by Stuchka (in Russian 1931); Amfiteatrov, Basic Features of a Draft of a Statute on Contracts (draft appended, in Russian 1934).

[31] 1 Civil Law Textbook (1938) 40 *et seq.*; 2 *id.* 35; 1 Civil Law (1944) 9, 19; Zimeleva, Civil Law (1945) 112. See also Chapters 5, 6, and 7.

[32] E.g., Molotov: " . . . plan, contracts, commercial basis, all these are elements of a single bolshevik economic policy," Molotov, In the Struggle for Socialism (in Russian 1934) 380; 1 Civil Law Textbook (1938) 86; 1 Civil Law (1944) 301.

[33] U.S.S.R. Laws 1931, texts 109, 166.

numerous enactments were adopted and not included in the Civil Code, which outlined the special rules governing contracts among government agencies engaged in business as a method of carrying out a general governmental economic plan.[34]

Thus, although any dualism in law, viz., one law for the private and another for the socialist sector, was rejected, it does, in fact, appear in the soviet law of contracts to the extent that contracts in the socialist sector of economy come under numerous special rules. But at present, soviet jurists wish also to subordinate obligations between individuals to the general economic plan. According to the textbook of 1944:

> Under the soviet law, obligations serve these main purposes. The most significant group of obligations is directed immediately to the fulfillment of the government plans of national economy and the satisfaction of the material and cultural needs of citizens. Then, a series of obligations is directed immediately to the protection of socialist and personal property. Finally, some obligations are directed toward the socialist distribution of the national income. These purposes represent a certain unity. A prerequisite of their achievement is the fulfillment of the governmental economic plan.[35]

However, not all the logical conclusions are drawn from these purposes. The soviet jurists face an enormous task of systematizing a large number of scattered and everchanging regulations and of reconciling them with the provisions of the Civil Code. They strive to see an organic unity in a body of rules opposed to each

[34] The most important among these are rules directing the procedure in the making of economic contracts and their content for the coming year, which were first issued in 1933 to regulate contracts to be made in 1934 and then prolonged and amended. See U.S.S.R. Laws 1933, text 445; *id.* 1934, text 435; *id.* 1936, text 27; *id.* 1938, text 302; *id.* 1939, texts 617 and 618; *id.* 1942, text 191.

[35] 1 Civil Law (1944) 294, also 371.

other. The soviet law remains beset with the unsettled controversy of free contract versus strict plan. But it seems that soviet jurists wish to close their eyes to the contradictions in their statements. Thus, the authors of the 1945 textbook open the discussion of contracts with the statement that "the basic principle of the soviet plan of making contracts is the principle of freedom and equality of the contracting parties on the basis of a combination of public and personal interests." After that, they proceed to describe how the plan affects contracts, without realizing that the picture drawn indicates absence of freedom of contract. States the textbook:

> The contracts in our commerce are determined and directed by the national economic plan either directly or in the last analysis . . . In some instances, the contracts made, flow from the planned assignments mandatory on both parties to the contract. In others, the parties themselves decide independently what kind of contracts must be made in order to fulfill planned assignments. In still other instances, the socialist State exercises pressure upon contracts, by regulating prices, determining the amount of production, its quality, assortment, manner of realization, et cetera. Finally, in a number of cases, the State influences the will of the parties and thereby the content of contracts only indirectly by means of regulation of economic conditions . . . In a number of instances . . . the content of the most important contracts is determined in advance by issuance of standard or model contracts, by fixing prices, and the like.[36]

The conclusion should be just the opposite of what the book states, viz., that free will in the making of a contract is greatly curtailed under the principle of the domination of the plan.

There is no general formula on the relation of acts of planning to contracts made between government agencies, but a series of specific rules relating to certain

[36] Zimeleva, Civil Law (1945) 114, 115.

branches of economy. It suffices to analyze certain provisions to illustrate the effect of planning upon contracts. The annual and quarterly plans of supplies of governmental industries with material, equipment, and fuel are approved by the Council of Ministers (formerly Commissars). Annual and quarterly quotas are assigned to individual ministries under whose jurisdiction the supply agencies function. Each ministry reassigns its quota among the subordinate supplying agencies, specifying the manufacturing agencies to be supplied and the terms of the contracts to be made between the two types of agency for this purpose.[37] These assignments impose obligations on both the supplying and manufacturing agencies to make contracts incorporating the terms of assignment. If the making of a contract is delayed, even without fault of any party, the parties must nevertheless perform as if a contract had been made.[38] This renders contracts between agencies actually contracts in name only. Essentially, such a contract is an administrative act of two subordinate agencies defining the details of the execution of an order by the superior.

It is difficult to agree with the 1944 textbook that thereby the significance of contract is not diminished. The textbook argues that:

> Before the making of a contract, the obligations of the parties thereto are not sufficiently defined in detail, a series of questions is not yet regulated, and therefore, prior to the making of a contract, there can be essentially only initiation of performance or security given for the proper performance of a

[37] Concerning the preparing and approval of the annual and quarterly balances and plans of supplying the national economy with material, equipment, and fuel, see U.S.S.R. Laws 1938, text 316. See also Order of the Commissar for Heavy Industry of April 13, 1935, No. 437, and cases decided by Governmental Arbitral Tribunal abstracted in 1 Civil Law (1944) 314, 315.

[38] 1 Civil Law (1944) 315; Zimeleva, Civil Law (1945) 100.

prospective contract. Prior to the making of the contract, no such acts may be demanded from the parties as are to be definitely determined only in the future contract.[39]

This argument overlooks the fact that the essential point of the legal effect of a contract is the creation of the obligation (see *supra*). Therefore, if this obligation arises before and independent of a contract, the very spirit of contracting is negated. Contract becomes a mere formality. Especially is this so, because in many instances even the terms of the contract are set in advance. Thus, the so-called "delivery" contracts, i.e., contracts to supply various kinds of goods (coal, oil, textiles, and others), are often regulated by the so-called "basic terms" approved by the Economic Council attached to the Council of Ministers or an individual ministry. Such "basic terms" are mandatory. Parties may not depart from them. If they do, the stipulation in question is void, the corresponding clause of the "basic terms" being enforced instead.[40] "Basic terms," established by the Economic Council, are binding on all economic agencies; those made by agreement of several ministries bind agencies under their jurisdiction, and the terms approved by a single ministry are mandatory only for agencies subordinate to it. Special rules regulate the procedure for co-ordinating conflicting rules.[41]

The plan interferes not only with the making of contracts but also with their performance (see *infra*). In soviet law there are also many other forms of interference of the economic plan and the higher governmental

[39] 1 Civil Law (1944) 315.
[40] U.S.S.R. Laws 1938, text 302; *id.* 1939, texts 617, 618; 1 Civil Law (1944) 304.
[41] Instruction of the Government Arbitral Tribunal attached to the U.S.S.R. Council of the Commissars of December 9, 1940, No. 7A/28 (in Russian 1940) Arbitration No. 11/12, 43.

authorities with contractual freedom of soviet business agencies—the governmental quasi corporations.[42] There is no need to trace these in detail, because they are subject to change from time to time, as all administrative matters are.

All this makes contract as a form of business relations among government agencies essentially different from contract as defined in the soviet Civil Code; it is to an extent fictitious. The law of contracts as outlined in the Civil Code has its full effect when citizens, or citizens and government agencies, are parties to a contract. It is also applied in contracts involving foreign trade.

Business transactions among government agencies come under the provisions of the Civil Code only in the absence of a conflicting governmental order. The disappearance of free private enterprise from the soviet economy deprived the soviet law of contracts of a natural soil for its growth and development. Under these circumstances, legal constructions which purport to bring complex relations among government agencies, under the term contract, are hazy and artificial.

8. Principle of Specific Performance

At present, the soviet jurists unanimously insist that soviet law is governed by the principle of specific performance.[43] By payment of damages caused by nonperformance, the debtor is not absolved from the obligation to perform. The provisions of the Civil Code (Sections 107 and 120) apply this principle only to

[42] 1 Civil Law (1944) 304, refers to "Rules of the U.S.S.R. State Bank, rules concerning domestic commerce issued by the Ministry of Domestic Commerce, rules of savings banks, governmental insurance offices, and others." See also *leges cit. supra,* note 37, also U.S.S.R. Laws 1930, text 409; *id.* 1935, text 167; *id.* 1940, text 636.

[43] 1 Civil Law (1944) 372, 373; Zimeleva, Civil Law (1945) 133.

obligations, the subject matter of which is "the grant of use of an individually defined thing." In such instances, the creditor may sue to have the thing taken from the debtor and given to himself. But soviet jurists think that "the principle of specific performance corresponds to the purposes which the obligation serves under the soviet law." The textbook of 1944 explains this in the following terms:

> Since the socialist national economy demands that the flow of goods run along the channels established by the plan, the general rule is that the debtor is not relieved from specific performance by paying damages in money . . . Failure to perform primarily provides ground to demand the specific performance stipulated . . . This is especially important when the parties are socialist organizations. Specific performance of such obligations is at the same time the fulfillment of the national economic plan . . . Section 19 of the rules concerning the making of contracts for 1934 (U.S.S.R. Laws 1933, text 445), obligated the socialist organizations to stipulate in contracts the consequences of breach of contract: penalty, fines, and damages. But the section also provides that the payment of these does not relieve the party from performance of the contract. The meaning of this clause is that parties may not substitute, by their agreement, compensation in money for specific performance; that specific performance is mandatory. Compensation in money is due not instead of specific performance but along with it to satisfy the creditor for improper or delayed performance. The creditor may not fail to demand specific performance by the debtor. The exercise of the right to ask specific performance is the duty of the creditor toward the State. It is implied in the general duty of each socialist organization to carry out the governmental national economic plan . . . [On the other hand,] If the assignment under the plan expires, the specific performance designed to fulfill the assignment also expires. Under Section 5 of the Resolution of the Economic Council attached to the U.S.S.R. Council of Commissars of December 2, 1938 (U.S.S.R. Laws 1938, text 316), an assignment of supplies of basic production remains in force after the expiration of the quarter for which it was issued but not beyond the end of the year. After the expiration

of the fiscal year, the purchaser may demand only compensation for nonperformance.[44]

The soviet textbooks emphasize that specific performance is also secured by means of criminal law. Reference is made to the following acts:

(a) The Act of February 18, 1931,[45] which reads:

In case a governmental economic agency fails to execute, or executes improperly, an order or delivery undertaken under a contract for the benefit of governmental industries, transport, or the socialized sector of agriculture, as well as for other socialized branches of the national economy, the directors of the establishments and other officers responsible for the execution of a certain order or delivery shall be prosecuted for a crime committed in the discharge of official duties.

(b) Under the Edict of July 10, 1940,[46] the director, the chief engineer, and the head of the department of technical inspection of a plant must be prosecuted in court in case the output of products is of bad quality, is insufficiently finished, or does not comply with the standards.

9. Damages for Nonperformance

Although the provisions of the soviet Civil Code dealing with this subject matter do not show any particular deviation from other European civil codes, their interpretation by soviet courts and legal writers is of considerable interest. The pertinent provisions of the Code are as follows:

(a) *Loss of profits.*

117. Where the debtor fails to perform his obligation, he must compensate the creditor for damage caused by the non-

[44] 1 Civil Law (1944) 372, 373.

[45] U.S.S.R. Laws 1931, text 109; 1 Civil Law (1944) 374. Zimeleva, Civil Law (1945) 131.

[46] Vedomosti 1940, Nos. 23 and 28. For translation, see Chapter 11, note 21.

performance. Damage shall be deemed not only the positive loss to property but also loss of such profit as would occur under normal conditions of trade.

Although the text of Section 117, drafted in accordance with capitalist commercial law, expressly secures the creditor compensation for the "loss of such profit as would occur under normal conditions of trade," this clause had a restricted effect in the soviet courts and jurisprudential writings. Since the stated views are not totally identical, the pertinent passages are here translated in full to show the shades of meaning.

(1) The textbook of 1938 comments:

> Profit lost means profit which the creditor would have obtained had the debtor accurately performed his contractual obligation but which the creditor has not in fact received because the debtor failed to perform. The R.S.F.S.R. Supreme Court has repeatedly ruled that the provisions of Section 117 concerning compensation for the loss of profit must be strictly construed. In particular, the Supreme Court expressly pointed out that the creditor may claim as profit lost only such sums as he is able to prove to be surely secured for him if the contract were properly performed. But a profit which the creditor merely expected to obtain as a result of performance and the possibility of which he was not able to prove shall not be subject to compensation. "The litigants," said the Supreme Court, "made attempts to stress the formal meaning of the provisions of Section 117 which include in damages also loss of profit, and to use these provisions as a pretext for restoration of the old principles of commercial law, permitting the recovery of a speculative profit flowing from the gamble on market prices. The courts are hereby instructed to appraise in similar cases the loss of profit on the basis of real business without entering the province of guesswork on probable profits." [47]

Arbitral tribunals settling disputes among government enterprises, in general, refuse to adjudicate loss of profits and re-

[47] R.S.F.S.R. Supreme Court, Civil Appellate Division, Report for the Year 1925, Civil Code (1943) 175, also Chapter 15, pp. 540–541.

strict damages to the positive loss to assets (i.e., only the direct damage).

Courts and arbitral tribunals . . . have held that damages include only loss already sustained by the creditor at the time of trial. Expected loss which the creditor has not sustained but may sustain in the future is not subject to compensation.[48]

(2) The textbook of 1945 sought to define with more details the meaning of the terms "positive loss to property" and "profit lost":

> Positive loss to property is the actual loss to property of the creditor which has occurred as a result of the debtor's failure to perform his obligation. E.g., a plant, the purchaser of coal, was compelled to substitute for it more expensive firewood because of the failure of the debtor, the vendor of the coal, to deliver it. The difference in the money paid for the firewood corresponding to the nondelivered coal constitutes the positive loss, the actual damage to the plant—the purchaser.
>
> Profit lost is such profit as the creditor could have obtained if the debtor had completely and in time performed his obligation but which profit the creditor has not actually obtained. For instance, a dressmaking shop is supposed to receive, according to the plan, two rubles for each overcoat made. Because the vendor of cloth has failed to perform his obligation to supply it, the shop failed to make and sell one thousand overcoats and, consequently failed to obtain two thousand rubles profit which it could have obtained, if the obligation to deliver the cloth had been strictly performed.
>
> From this example, it follows that in relations among the socialist enterprises the profit lost is essentially and most frequently *failure to obtain the planned profit.* The judicial practice is quite cautious in adjudicating profit lost as damage and construes such profit in a very restricted manner, pointing out that no guesses respecting the possible profit may be permitted. Likewise, arbitral tribunals settling disputes between governmental enterprises, as a rule, abstain from adjudicating profit lost under the title of damages.[49]

[48] 2 Civil Law Textbook (1938) 62, 63; Civil Code (1943) 175. See also pp. 540–541.

[49] Zimeleva, Civil Law (1945) 131, italics in the original.

(3) A somewhat different construction of profit lost subject to compensation is given in the 1944 textbook:

> The creditor must prove that the direct damage caused by nonperformance actually occurred. The existence and the amount of such damage must be proved by bookkeeping data. No compensation shall be awarded for damage caused by the fact that the creditor exceeded the funds to be spent for materials, established by the plan, or acquired materials in excess of the established normal amounts. Likewise, in compensating for profit lost, the courts and the arbitral tribunals settling disputes among government agencies *may not adjudicate it solely on the ground that the profit was planned.* The carrying out of the plan depends upon the people who are charged with this task. The creditor must prove that the plan would have been carried out. This rule is sometimes expressed in the formula that *planned profit is not subject to compensation.* Such formula lacks precision: the fact that the profit is provided for in the plan does not, of course, prevent compensation therefor, but it must be proved that the planned profit would have been obtained.
>
> Profit lost may, as a rule, be demanded by a socialist organization from another such organization only upon the expiration of the period for which the plan was made. Prior to the expiration of this period, the creditor must demand only specific performance.
>
> The socialist national economy excludes the so-called abstract method of calculation of the profit lost. Under this method the profit lost is defined as the difference between the market price of the goods on the date stipulated for performance and the price under the contract. But in obligations incurred in foreign trade, the abstract method of calculation of profit lost is not excluded.[50] (Italics supplied.)

These quotations well illustrate one of the major difficulties faced by soviet jurists in the interpretation of their law. Soviet statutes still carry some legal principles borrowed from capitalist law, designed to settle disputes between independent private entrepreneurs, but soviet reality lacks this background.

[50] 1 Civil Law (1944) 381.

The right to compensation for loss of profit presupposes the right of a private businessman to the profit he derives from the use he makes of competition on the free market. In a legal system which regulates the relations between agencies of a single owner, the State, and in which the plan dominates, the profit of such agencies is in fact a pure bookkeeping transaction. Planned profit is not necessarily based on practical business calculations. To neglect it altogether means to deny the reality of the plan. To accept it as a yardstick of damages implies the danger of a judgment based on fiction. The whole discussion quoted from the textbook of 1944 shows how soviet legal thought is hopelessly lost in solving this dilemma.

In connection with damages for nonperformance, it may be noted that the soviet Civil Code grants the court express power to "take into consideration the economic status of the debtor" when adjudicating damages for nonperformance or delay in performance, and either defer payment of the same or order payment in installments (Section 123). This provision is, however, superfluous, because under Section 182 of the Code of Civil Procedure the soviet court has the same power with regard to any judgment.

(b) *Impossibility.*

118. Unless otherwise provided by law or contract, the debtor shall be relieved from liability for nonperformance, if he proves that impossibility of performance resulted from circumstances which he could not prevent, or that it came about owing to intentional design or negligence of the creditor.

The soviet judicial bodies, courts, and arbitral tribunals, settling disputes among government business organizations, persistently have held that the phrase "circumstances which the debtor could not prevent"

means *force majeure* (acts of God). However, the courts have refrained from defining *force majeure* (insuperable force in Russian terminology) more closely. "The notion of insuperable force," said the R.S.F.S.R. Supreme Court in 1925, "is relative. An obstacle preventing the performance of a contractual obligation becomes insuperable force not by reason of its distinctive qualities but through the interrelationship of a number of conditions and concrete circumstances. What in one place is easily surmountable may be in another place insurmountable." [51]

Professor Agarkov, the author of the chapters on obligations in the textbook of 1944, correctly calls the court's formula "hazy" but reads into it his own conception of *force majeure* as a fortuitous event which could not be prevented by any means.[52] Professor Agarkov has challenged the correctness of the interpretation of Section 118 of the soviet Code adopted by the soviet courts and has insisted that its text warrants the conclusion that the debtor should be relieved from liability for damages, if he proves that the performance became impossible because of a simple fortuitous event and not necessarily by *force majeure* (act of God). For this, it suffices if the debtor proves that he was not at fault in not preventing the occurrence of the event which made the performance impossible.[53] He has objected further against the confusion in soviet judicial practice respecting liability for breach of contract and in tort. His comparison is abstracted in Chapters 14 and 15 on

[51] R.S.F.S.R. Supreme Court, Civil Appellate Division, Report for 1925, 2 Civil Law Textbook (1938) 405; 1 Civil Law (1944) 341.

[52] 1 Civil Law (1944) 341.

[53] *Id.* 376 *et seq.*, 341 *et seq.*

Torts. His views are expounded in the textbook of 1944 and a monograph printed in 1945.[54]

In connection with World War II, the question of the impact of war on performance of contracts came up before the U.S.S.R. Supreme Court, which took the point of view that the fact of war in itself does not relieve a debtor from his obligation to perform the contract. The debtor must prove that the war emergency made the performance directly impossible. In the case in question, a fishermen's co-operative was sued by the cannery for payment of the penalty stipulated in case of the failure to supply the promised amount of fish. Said the court:

3. In defense, the defendant refers to the facts that seventeen members of the co-operative were called to colors, that fishing was impossible because of military operations in fishing waters, and that in connection with military operations fishing gear of large value was lost. Not all the defenses have the same value and may be considered by the court in judging the case on its merits because the usual and quite natural difficulties caused by the war, such as the mobilization of the members of the co-operatives, may not be taken as a reason for relieving the defendant from the performance of the contract. Only such defenses of the defendant may be taken as a reason for relieving him from performance of the contract as are essential and are directly connected with war emergencies, e.g., military operations in fishing waters, loss of fishing gear as a result of military operations, and the like. If these circumstances are fully proven by the defendant, the court may apply to the contractual relations of the parties Sections 118 and 144 of the Civil Code absolving the debtor from liability for failure to perform the contract.[55]

[54] Agarkov, "Contribution to the Problem of Contractual Liability" 1 Problems of the Soviet Civil Law (in Russian 1945) 115–155. For the rest of it, see *infra*, Chapter 14, IV, 3.

[55] Shalsk Cannery v. Collective of Fishermen Priboy, U.S.S.R. Supreme Court, Civil Trial Division, Decision No. 532, 1942 (1942) Judicial Practice of the U.S.S.R. Supreme Court No. 2, 33–34. See also Orlovsky, "Performance of Contracts in Time of War" (1942) Socialist Legality No. 3/4, 11.

10. Miscellaneous Provisions

Provisions of the Civil Code dealing with contracts made by agents (Sections 38–40), conditions (Sections 41–43), proposal and acceptance (Sections 109, 131–135), interest (Section 110), contracts benefiting a third party (Section 140), earnest money (Section 143), joint and several liability (Sections 115–116), assignment (Sections 124–129), time, place, and nature of performance (Sections 108, 111–114, 144–146), and delay (Sections 121–122) do not display any features requiring comment. Some observations with regard to contractual penalties are given in the comments to Sections 141–142.

Unjust enrichment is discussed in Volume II, No. 2, comment preceding Section 399.

Chapter 13

Individual Contracts

The provisions of the soviet Civil Code dealing with particular contracts (Civil Code, Law of Obligations, III–XI, Sections 152–398) regulate lease of property (landlord and tenant), sale, barter, loan, independent contractor, suretyship, agency, partnership, and insurance. Master and servant, negotiable instruments and some other contracts come under special statutes, and some contracts lack statutory regulation. The present chapter is confined to the discussion of contracts which are regulated in a manner that is of special interest for a nonsoviet jurist. Among contracts regulated by the Civil Code, only sale and landlord and tenant are discussed here, while master and servant come within the scope of Chapter 22, Labor Law, and agency, partnership, and insurance, are analyzed in brief in the opening comments to IX, X, and XI of Law of Obligations of the Code (see Volume II). It was felt that the provisions of the Civil Code concerning other contracts are self-explanatory, and the reader is referred to the pertinent Sections 206 through 250 of the Civil Code, printed in the second volume.

I. Sale

1. Preliminary

The provisions of the Civil Code regulating the contract of sale explain the soviet law of sale only to a lim-

ited extent. As in many other spheres of soviet law, two sets of rules are in fact in existence on this subject, one applicable to sales between private persons and to sales to private persons by government agencies, and another to sales between government agencies. Provisions of the Civil Code are applicable primarily to sales between individuals and to purchases by individuals from government agencies. These provisions are applicable to sales between government trading agencies (quasi corporations), only insofar as no other rules are established by separate federal enactments and administrative orders.[1] Moreover, the theoretic construction of the rights of such agencies to government property assigned to them has posed a specific problem to the soviet jurists.

2. Sales Between Government Owned Quasi Corporations

As discussed elsewhere, at present soviet jurists do not regard the rights of a government quasi corporation engaged in business to government property assigned to it as rights of ownership, but as rights of management.[2] Now, under the Civil Code, Section 180, sale is defined as a contract whereby the seller "undertakes to transfer property to the ownership" of the buyer, and the buyer undertakes to pay the price agreed upon. The textbook of 1944 offers a lengthy discussion of the problem arising from this situation:

A large number of sale contracts are made among governmental organizations and enterprises. Those contracts entailing the transfer for payment of large quantities of goods from

[1] Civil Law (1944) 10, 13.
[2] See *supra*, Chapter 11, p. 398 *et seq.*

the jurisdiction and administration of one governmental organization or enterprise to another are not connected with the transfer of the right of ownership. Governmental socialist property is the domain of all people belonging to the soviet nation as represented by their State. As mentioned above,[3] governmental organizations and enterprises to whose management certain portions of a single fund of governmental socialist property are assigned are not the owners of such property. They merely manage such property for the purpose of fulfillment of tasks assigned to them by the State and of plans entrusted to them. Consequently, it must be admitted that sales transactions occur in the Soviet Union which do not coincide entirely with the legal definition of sale embraced in the civil codes of the soviet republics.

The following two criteria are essential for such transactions: (a) the management and not the right of ownership of the property sold is transferred from one government agency to another; (b) the seller confers upon the buyer the property sold on the basis of and in fulfillment of the plan; the buyer accepts the property sold to make use of it in accordance with the plan.

The transfer of management of property from one government agency to another is put into the legal form of a sale because these transfers are conducted on a commercial basis (*khozraschet*). One government agency transferring management of the property to another agency receives an equivalent in money for the things transferred. Thus, all the criteria of sale are present, except the transfer of ownership: the seller hands over the property and the buyer undertakes to pay for it the stipulated price . . .

Contracts of sale between governmental agencies on the one hand and the co-operative or public organizations on the other, as well as such contracts among the last named organizations, entail in contrast with sales among government agencies the transfer of ownership from the seller to the buyer. However, even in such instances, the most important question, from a legal point of view, is whether the transaction falls within the governmental economic plan . . .

Thus, a contract of sale among governmental organizations may be defined as a contract by virtue of which a governmental

[3] The discussion of the textbook here referred to is translated in Chapter 11, pp. 398–399.

organization—the seller—undertakes to transfer a property in accordance with the plan to the management of another government agency—the buyer—and the buyer undertakes to accept such property in order to make use of it in accordance with the plan and to pay the established or stipulated price.

But the contract of sale between a government organization, on the one hand, and a co-operative or a public organization, on the other, as well as a contract of sale between a co-operative and a public organization, may be defined as a contract by virtue of which the seller undertakes, in accordance with the plan, to transfer the ownership of the property to the buyer and the buyer undertakes to accept the property for the purpose of making use of it in accordance with the plan and to pay for it the established or stipulated price.[4]

The tenor of the discussion and the definitions of sales given in the conclusion are in discord with the concept of sale as defined in Section 180 of the Civil Code. The provisions of the section construe sale as a bargain in general, regardless of the person of the seller and buyer, and expressly designate the transfer of ownership of the property as the purpose and ultimate effect of the sale. In the passage quoted above the textbooks seek to construe two kinds of sales: one effecting only the transfer of the right of management (sale between government agencies) and another effecting the transfer of ownership (sale to co-operatives, and by implication, to citizens). As Venediktov, a soviet professor, correctly remarks, any attempt to reconcile these two concepts would lead only to highly formalistic and artificial constructions. He himself is of the opinion that "it is necessary to admit that the concept of contract of sale in the soviet civil commerce, and therefore in the soviet civil law, is broader than the concept given in Section 180 of the Civil Code."[5] Having thus recognized the

[4] 2 Civil Law (1944) 3–5.
[5] Venediktov, "The Right of Government Socialist Property" 1 Problems of Soviet Civil Law (in Russian 1945) 112.

discrepancy between the statute and the actual operation of law, Venediktov proposes to state in the future Civil Code that by a sale the goods are transferred not to the ownership of the buyer but to his "disposal."[6] This does not solve the discrepancy. Any clause accurately expressing "sale" between government agencies, which, according to soviet jurists, does not transfer ownership, will not fit sale to co-operatives or to citizens; the latter sale requires by its very essence and economic purpose the acquisition by the buyer of all powers implied in the ownership and not merely the right of disposal.

In fact, the general purpose of all transactions called in soviet law "sales" is to move the goods through a series of production processes ultimately to the consumer. But the consumption of a thing presupposes on the part of the consumer, not only the right to dispose of it, but also the right to use and possess it, that is, all the powers constituting the elements of the right of ownership, as defined in Section 58 of the Civil Code, which is not contested by the soviet jurists.[7] It may be also argued that the soviet jurists use the term "management" in a highly artificial and unusual meaning when they define the right of a government unit to government property assigned to it as right of management.[8] However true this may be with regard to capital goods, which under the provisions of the soviet law may not be alienated to private persons, it is artificial to say that a government agency which has obtained materials for manufacturing consumers' goods (e.g., a tailor shop

[6] *Ibid.*

[7] See Chapter 16, p. 557.

[8] Some soviet writers are fully aware of the ambiguity of such usage. Venediktov attempts to construe a concept of "operative management" in contrast to pure administration, *op. cit. supra*, note 5, at 106 *et seq.* The same term is occasionally used in the textbooks of 1944 and 1945.

that receives cloth to make dresses) receives these materials for management.

It seems, therefore, that the recent attempts of soviet jurists to depart from the concept of sale as defined in Section 180 of the Civil Code lead only to highly spurious constructions. The definition in the Civil Code expresses well the very essence of sale in accord with the world-wide concept of sale. This concept needs no revision to embrace the realities of soviet commerce. But the legal nature of acts under which government property is handed over by one government agency to another, and which are called sales by the soviet statutes, may be questioned. The difficulty in bringing them under sale, as defined in the Civil Code, finds an explanation in the fact that these acts are sales only in name. If the government is considered the sole and single owner of the property handled by the soviet quasi corporations—legal entities—the so-called sales made by one such agency to another are essentially only bookkeeping transactions, although they may be treated by analogy to sales. But the real sale arises only when the ownership of the goods is changed, i.e., when goods are transferred not from one agency of the owner, the government, to another such agency, but to another owner, viz., a co-operative or a private person.

One should not be misled by the nomenclature used in soviet law, such as legal entity, contract, sale. Soviet legal entities originated at a time when they were designed to compete and co-operate with private business. They had to deal not only among themselves but also with private dealers. At that time their contracts were real contracts, but, with the disappearance of private business, the form of the legal entities given to govern-

mental agencies engaged in business and the form of contracts in which their business relations are clothed have become merely a method of management of government-owned industry and commerce. These forms, borrowed from the free market economy of the capitalist world, have been retained to stimulate the business efficiency and competitive vigor of government agencies, but over and above the contracts and the legal entities is the order of a superior ministry and other government bodies authorized to enforce and interpret the economic plan. Thus, these forms are rather slogans than economic realities. Essentially, the business relations between soviet trading agencies are a matter of administration and not of bargaining. The European law of contracts in general and of sales in particular developed as a means to settle disputes between independent trading units. Any attempt on the part of the soviet jurists to apply to the soviet law legal concepts grown on this soil leads only to highly artificial and perhaps unnecessary constructions. Disputes are settled by an administrative agency or government arbitration, taking into consideration primarily the governmental plan and not the contract.[9]

In concluding this survey, it may be stated that a nonsoviet jurist should not rely upon the resemblance of the soviet law of sales as it appears in the soviet Civil Code with nonsoviet law. Acts of transfer of goods between government agencies, called in soviet law sales, are construed in the recent soviet jurisprudential writings in a totally different light. Moreover, great emphasis is placed by recent soviet writers upon conformity of any sale with the governmental economic plan.

[9] Compare pp. 870–874.

Neither the methods of interference of the plan with sales between private persons nor the specific constructions of sales among government agencies are clearly defined in soviet law, statutes, or court decisions. The soviet law of sales is in process of re-examination and is far from crystallized.

3. Contract to Sell: Contract of Delivery of Goods (Contract to Sell Future Goods)

The wording of the definition of sale contained in Section 180 of the soviet Civil Code does not show clearly whether it provides for what the Uniform Sales Act calls technically a sale, whereby the seller transfers the property in goods, or for a contract to sell under which the seller merely agrees to transfer property in the future.[10] Certain characteristics of the imperial law of sales influenced the soviet concept and need, therefore, to be mentioned in brief.

The statutory provisions of the imperial civil laws treated sales not in conjunction with contracts but as a form of conveyance of title to property.[11] Therefore,

[10] Uniform Sales Act, Section 1:
(1) A contract to sell goods is a contract whereby the seller agrees to transfer property in goods to the buyer for a consideration called the price.
(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

[11] The earlier writers and early decisions of the Ruling Senate, adhering to the so-called French against the Roman-German view, sought to develop the doctrine of sale under the Russian civil law as a conveyance, not a contract. See Pobedonostsev, 2 Course in Civil Law (in Russian 1896) 323 *et seq.*; Guliaev, The Russian Civil Law (Russian 4th ed. 1913) 401 *et seq.* However, in the twentieth century, the outstanding writers insisted upon the contractual nature of sales, in particular, Shershenevich, 2 Textbook of the Russian Civil Law (in Russian 11th ed. 1915) 95 *et seq.*, whose definition was adopted word for word by Section 180 of the soviet Civil Code. See also Sinaisky, 2 The Russian Civil Law (in Russian 1915) 108 *et seq.* The Ruling Senate also tended to pay attention to the contractual aspect of sale and to require ownership on the part of the seller only where an individually defined thing was sold. See decisions cited *infra*, note 15.

it was expressly provided by statute that only the owner may sell the property.[12] This made the imperial concept of sale even more restricted than sale under the Uniform Sales Act. But two other contracts were also provided for, both together constituting an equivalent to a contract to sell under the Uniform Sales Act (agreement to sell of the English Sale of Goods Act of 1893). One of these was technically called agreement to sell (*zaprodazha*),[13] another, applicable only to goods defined by number, measure, or weight, was called contract of delivery of goods (procurement, *postavka* in Russian).[14] The seller under both of these contracts does not have to be the owner when the contract is made. The contract of delivery more nearly resembles the contract to sell future goods under Section 5 of the Uniform Sales Act.

The original provisions of the soviet Civil Code regulate sale only and define it (Section 180) as a contract whereby the seller "*undertakes* to transfer the property to the ownership" of the buyer. This phrase resembles the contract to sell, of the Uniform Sales Act, under which the seller "*agrees* to transfer the property in goods to the buyer." But the soviet Code provides also, similarly to the imperial laws, that "the right of sale of a property except when sold at public sale shall belong to the owner" (Section 183). Moreover, under the soviet Code the right of ownership in an individually defined thing arises at the moment when the contract providing for its transfer is made (Section 66). Thus, the soviet jurists read in these provisions a sale rather

[12] Civil Laws, Section 1384, Vol. X, Part 1 of Svod Zakonov (1914 ed.).

[13] *Id.*, Section 1679: "a contract whereby one party promises to sell to the other party at a certain time movable or immovable property."

[14] *Id.*, Sections 1737, 1738, 1742.

than a contract to sell. But in general, they take a middle course and require from the seller of an individually defined thing the ownership thereof at the moment when the contract of sale is made. With regard to goods defined by number, weight, and measure, they think that it suffices if the seller is the owner when the goods are delivered.[15]

In 1925 and 1926, provisions concerning an instrument of agreement to sell, but only with reference to the sale of buildings, were incorporated into the Code (Sections 182 [a-c]).[16] The soviet Civil Code still lacks any provisions concerning contracts to sell in general or the contract of delivery (procurement) corresponding to the contract to sell future goods. A separate statute on deliveries to the government was enacted in 1921 and was superseded by another act of 1927; this was officially appended to the Code (Section 235) and several times amended, but at present it is considered obsolete.[17] However, the contract of delivery of future goods between government agencies was called to life by scattered provisions of numerous separate statutes.[18] The textbook of 1938 barely touched upon the subject,[19] but the text-

[15] 2 Civil Law (1944) 14; 2 Civil Law Textbook (1938) 65, 66; Danilova, Sale, 4 Civil Code of the R.S.F.S.R., a Commentary (in Russian 1924) 34; Goikhbarg, 1 Economic Law (in Russian 3d ed. 1924) 192 *et seq.* For soviet criticism of the draftsmanship of Sections 180, 183, 66, see Stuchka, 3 Course (1931) 84. The provisions of Section 66 of the Civil Code and the pertinent doctrine of soviet jurists followed the view of the Ruling Senate, Civil Appellate Division, Decisions 1868 No. 229; 1869 No. 317, No. 462; 1870 No. 645; 1871 No. 618; 1875 No. 10; 1880 No. 94 and No. 288.

[16] Such instrument of agreement to sell was provided for in the imperial law regarding immovables. *Lex cit. supra*, note 12, Section 1680.

[17] U.S.S.R. Laws 1927, texts 291, 292, 536; *id.* 1928, text 160 and *id.* 1929, text 727. Considered obsolete, 2 Civil Law Textbook (1938) 64; 2 Civil Law (1944) 11; Civil Code (1943) 127; *id.* (1948) 125.

[18] E.g., U.S.S.R. Laws 1933, text 445; *id.* 1938, texts 85, 316; *id.* 1939, text 69; *id.* 1940, text 636; *id.* 1942, text 191.

[19] 2 Civil Law Textbook (1938) 64.

books of 1944 and 1945[20] characterize the contract of delivery as a special form of sale most frequent between government institutions and discuss it at greater length than sale in general.

The contract of delivery (contract to sell future goods), according to the textbooks,[21] is distinct from sale because only goods defined by number, weight, and measure (merchandise) may be sold under this contract. Delivery as a rule occurs over a considerable period of time; goods are delivered and paid for in installments. The seller does not have to be the owner (or in control) of the merchandise when the contract is made. These are precisely the points of difference between the sale and delivery contracts under the imperial law.[22]

4. Special Provisions: Conditional Sale

The soviet law also contains special provisions concerning the sale of buildings, seeking to bar accumulation of houses by an individual owner or real estate business (Section 182). Supply of electric current or other power is not considered a sale and comes under special provisions.[23] Sale on installment of household furnishings, instruments of trade or profession, and of certain other things comes under special rules. Until full payment, the buyer may not sell, mortgage, or otherwise transfer the property to third parties, and the seller retains a lien on the property. Failure to pay three consecutive installments authorizes the seller to enforce full payment at once. If less than 60 per cent has been

[20] 2 Civil Law (1944) 18–36; Zimeleva, Civil Law (1945) 143–150.
[21] 2 Civil Law (1944) 19; Zimeleva, Civil Law (1945) 143.
[22] The Ruling Senate, Civil Appellate Division, Decisions 1868 No. 788; 1869 No. 931; 1871 No. 910; 1872 No. 1312; 1875 No. 294; 1880 No. 94 and No. 288; 1886 No. 83.
[23] E.g., U.S.S.R. Laws 1934, text 460; *id.* 1936, text 429.

paid, the seller may cancel the sale and recover the property, in which case the buyer must pay for the time he used it on a rental basis.[24]

II. Landlord and Tenant

The topic of landlord and tenant may be in soviet law more accurately called government and tenant. The bulk of the housing in large cities and industrial centers, which was confiscated from the prerevolutionary owners or built later by the government or with governmental aid, constitutes under the Constitution (Section 6) and in reality, government ownership. Rentals of premises in small houses still held by individual owners, under building tenancy (Civil Code, Sections 71 *et seq.*) or on lease from the local soviet, come under strict government regulation as respects the amount of rent and the space allowed to the tenant. Soviet law in this field is to be found in a large body of rules scattered, according to the soviet writers, over "hundreds of still effective decrees, orders of government departments, directives, and interpretations by local authorities, which were issued over a period of more than ten years and are not in accord one with another."[25] Because of the constant changes, "the main difficulty begins," according to a soviet writer, "after a required enactment is found, because then the question arises whether it is still in force and what the amendments are."[26] There-

[24] R.S.F.S.R. Laws 1923, text 770; Ukrainian Laws 1924, text 261. The Ukrainian law differs somewhat from that of the R.S.F.S.R.

[25] Gintsburg, "Housing Law" (1938) Soviet Justice No. 13. 9; Housing Legislation in Force (in Russian 1937) 3.

[26] Thus, the decree on compulsory leases of August 16, 1926, has been changed and suspended in various places twelve times. The law on rent of May 14, 1928, has been changed eleven times and, finally, the decree on eviction by administrative procedure of June 14, 1926 was changed by sixteen different laws. As a result, out of ten sections contained originally in

fore, only a few principles of the soviet law of landlord and tenant, of a general nature can be established with certainty without considering many detailed, transitory, and local rules.

The soviet law of landlord and tenant as it now stands has retained very little from the early period of unorganized squatting, dispossession of prerevolutionary owners and tenants, with or without order by authorities, and such bold experiments as the abolition of rent, announced on October 11, 1920.[27] Likewise, many privileges given during the New Economic Policy period to co-operative housing and privately built houses came to an end in 1937, when the last basic law concerning housing was enacted.[28] Under this law, the bulk of co-operative housing was taken over by the city governments.[29] Any discussion of the soviet housing law based on material antecedent to this enactment would not reflect the present situation.

Two principles have been carried over from the earlier period, one affecting the rationing of dwelling space and another the computation of rent. The unit of rationing is not an apartment or room but a specified floor space per capita. In 1945 this standard so-called "living and sanitation norm" originally defined as 8.25 square meters in the R.S.F.S.R. and 13.65 square meters in the Ukraine, was considerably reduced by the acts of the government in a number of cities.[30] This stand-

the decree, seven were modified, one was abrogated, and five new sections were added: Section 5 was changed five times; Section 6 six times. Brodovich, "Stability of Laws and Bringing Effective Legislation in Order" (1937) Soviet Justice No. 4, 39.

[27] R.S.F.S.R. Laws 1920, text 422, Sections (e) and (g).

[28] U.S.S.R. Laws 1937, text 314, Section 35. For its translation see Vol. II, No. 2, Comment 2 to Section 179.

[29] *Id.*, Sections 2–3.

[30] 2 Civil Law (1944) 60; Zimeleva, Civil Law (1945) 161; Khitev, Soviet Housing Legislation (in Russian 1945) 21.

ard neither represents a guaranteed living space nor reflects the average space actually occupied by a soviet citizen. Thus, the actual average per capita space in Moscow was computed as being 7 square meters in 1918 and 4.5 square meters in 1938.[31] In assigning living space, the authorities keep in mind these standards. However, as the textbook of 1944 explains:

> The existence of a "living and sanitation norm" does not preclude persons and agencies distributing the vacant living space from taking as a basis in some cases another higher norm. Likewise, there may be instances when the living space may be assigned in accordance with some lower standards. The significance of the "living and sanitation norm" lies in the fact that the space occupied by a person within the limits of this norm may not be taken away from him without his consent.[32]

This norm is equally applicable to government and private housing. Certain categories of citizens are entitled to extra space in the form of a separate room or extra floor space of from 10 to 20 square meters above the norm. These include executive officials of governmental and public offices; generals, admirals, and some commissioned officers; persons having the title of hero of the Soviet Union, meritorious scientists, artists, technicians, et cetera; persons decorated with military and civilian decorations; scholars, writers, artists, physicians practicing at home, and certain other professional men; and people suffering from certain sicknesses enumerated in a special schedule.[33] Whether or not a certain person is entitled to extra space is decided by the administrative authorities in charge of the distribution

[31] Hazard, Soviet Housing Law (1939) 16, for examples of crowded conditions, see pages 19–20, 50; Simon, Robson, Jewkes, Moscow in the Making (1937) 168.

[32] 2 Civil Law (1944) 60.

[33] *Ibid.*; Zimeleva, *loc. cit.*

of housing. Disputes arising out of the use of the extra space are subject to court jurisdiction.[34]

Prior to 1934, surplus space within the room of an occupant might be assigned to another person.[35] At present, only surplus space consisting of isolated rooms may be withdrawn from the use of the occupant, unless thereby two persons other than husband and wife or children under ten are forced to live in one room. The occupant may find a tenant for such surplus space himself within three months from the service of the notice thereof by the Soviet.[36] Such a tenant acquires the right to the space given to him, independent from that of the original occupant.[37]

The procedure in assigning housing and taking of occupancy depends upon the legal status of the particular house. Government houses assigned especially for employees of governmental offices and establishments are under the control of the directors of such offices and establishments. Dwelling space is assigned in these houses by virtue of employment, and space must be vacated with the termination of employment, regardless of the reason therefor. Upon the termination of employment, the occupant is evicted by administrative procedure.[38] Space in all other government houses is assigned by a municipal housing office. By such assignment, the management of the house assigned is bound to make a contract with the occupant for a period not to exceed five years.[39] The contract may be discontinued

[34] *Id.* 61.

[35] Law of August 16, 1926, Circular of August 10, 1932, No. 150 and February 15, 1934, No. 19. See Gsovski, "Review of Hazard, Soviet Housing Law" (1940) Iowa L. Rev. 400.

[36] 2 Civil Law (1944) 61.

[37] U.S.S.R. Supreme Court, Plenary Session, Ruling of December 12, 1940, Section 3, Civil Code (1943) 195.

[38] *Lex. cit. supra,* note 28, Section 31.

[39] *Id.,* Sections 23, 24.

prematurely only because of certain statutory grounds.[40] Upon the expiration of the lease, the occupant has a priority over any third party for the same space, provided he has discharged properly his contractual duties.[41] Prior to 1937, certain categories of occupants had the privilege of automatic prolongation of the lease after the expiration of the contract.[42]

In a house held in private ownership, under building tenancy, or under a lease from the Soviet, the extra space may be rented by the owner of the building tenancy to any person authorized to occupy the space rented without assignment from the housing office.[43] Upon the expiration of the term of the lease, renewal thereof may be refused, and the tenant evicted, if the owner or building tenant is really in need of the leased premises for his own family.[44]

The so-called basic rent, which does not include expenses of water supply and heating, is strictly regulated and depends upon the quality of the premises and earnings of the occupant. It is calculated per square meter of useful floor space according to schedules enacted by the local city soviet.[45] Extra space is paid for doubly or triply. Owners of private houses and building tenants are entitled to charge 20 per cent higher rent.[46] In government houses built after 1924, an addition of 25 per cent is permitted, if the normal rent does not cover the expenses of upkeep.[47] Water supply and heating is

40 These are enumerated *id.*, Section 30.
41 *Id.*, Section 26.
42 Civil Code, Section 147, repealed in 1938.
43 2 Civil Law (1944) 58.
44 U.S.S.R. Supreme Court, Plenary Session Ruling of December 12, 1940; Section 11, Civil Code (1943) 198.
45 U.S.S.R. Laws 1926, text 312 with amendments; R.S.F.S.R. Laws 1928, text 402; 2 Civil Law (1944) 67.
46 *Lex cit. supra*, note 28, Section 36.
47 2 Civil Law (1944) 67.

paid for in addition and depends upon actual cost.[48]

To illustrate the difficulty in establishing the rent under soviet law, the recent manual on housing legislation may be quoted:

> In order to calculate the rentals correctly it is necessary to know:
>
> 1) The rate of the basic rental per one square meter of living space in a given city;
> 2) The rate of rental per one square meter of living space in a given house;
> 3) The rate of rental, i.e., the rate per one square meter in the premises (apartment, room) occupied by the person in question;
> 4) The size of the occupied space;
> 5) Social status of the occupant and the number of members of his family living with him, also his dependents;
> 6) The amount of earnings of the occupant and of all members of his family who have independent earnings;
> 7) Privileges and exemptions enjoyed by the occupant under the law.
>
> Without knowledge of these basic elements which govern the rentals it is impossible to define them correctly.[49]

Occupants may exchange premises but only by consent of the person or the office in control of the housing. Consent may be refused only for reasons specified by law.[50] In many instances, the occupant may be evicted without court action by administrative procedure.[51] If a person sublets continuously an isolated room "for the purpose of speculation (to derive unearned income)," such room may be taken away from

[48] *Id.* 68.

[49] Khitev, *op. cit. supra*, note 30, at 58.

[50] *Lex cit. supra*, note 28, Section 28. Joint Instruction of the R.S.F.S.R. Commissars for Justice and Municipal Economy, No. 811/94 of November 3, 1939.

[51] *Lex cit.*, note 28, Section 31. For its translation and additional legislation, see Volume II, No. 2, Comment 2 to Section 179. For an early law on eviction by administrative procedure, see R.S.F.S.R. Laws 1926, text 282.

him, although it does not constitute any surplus of the space norm, by the court on complaint of the district attorney or housing administration.[52]

III. Lending of Property Free of Charge, Bailment, and Some Other Contracts Not Covered by the Civil Code

Numbers III through XI of the Law of Obligations deal each with a particular contract. However, two contracts remain unprovided for by the Code, although they occur often in life, according to the soviet writers. These are gratuitous lending of property and bailment. This lacuna has not been filled thus far by any other statutes. Some of the earlier soviet writers[53] were of the opinion that whatever is not expressly permitted under the soviet law is thereby prohibited, and denied any validity to contracts not provided for by the statute. This point of view proved to be impracticable, and recent soviet writers think that the general provisions of the Law of Obligations apply to these contracts. With regard to lending property, certain provisions concerning lease may be used, keeping in mind, however, the gratuitous character of lending. Thus, references are made to Sections 68, 111, 121, 136, 160, 176, 177, 186, and 233 of the Civil Code, while the application of Section 168 is denied.[54]

Regarding bailment unprovided for in the Civil Code, the pertinent principles should be deduced from statutory provisions covering particular instances of custody of property,[55] e.g., Sections 187 and 222, 275[i], 275[j] of

[52] Ruling *cit. supra*, note 44, Section 9, *op. cit.* 197.
[53] E.g., Malitsky 22, 23, quoted in Chapter 6, at note 76.
[54] 2 Civil Law (1944) 74–75; Zimeleva, Civil Law (1945) 172–173.
[55] 2 Civil Law (1944) 108; Zimeleva, Civil Law (1945) 195.

the Civil Code, the railroad statute,[56] the statute on shipping on inland waterways,[57] the model charter of city pawnshops,[58] the rules on custody of stray cattle[59] and rates on warehouses,[60] rules concerning custody by the vendor of goods sold but not paid for by the purchaser,[61] and rules concerning custody of cotton delivered in excess of the plan.[62]

With regard to the liability of a bailee, the following recent ruling of the U.S.S.R. Supreme Court is reported here:

1. In determining sums to be adjudicated from institutions, enterprises, and organizations (including theatres, hotels, bathing establishments, laundries, tailor repair shops, dyers, and the like), in compensation for effects deposited by citizens for safekeeping or in execution of a customer's order, and stolen, lost, damaged, or left without care by fault of the defendant, the court shall take into consideration the increased (commercial) prices in government commerce, allowing for wear, unless some other method of compensation has been established by the laws and regulations of the government.

2. Where there is reason to believe that such effects were stolen by employees to whom they were entrusted or were lost because of their criminal negligence, as well as in cases where the management of the institution, enterprise or organization displays a criminally indifferent attitude toward the fact of the theft or loss of a citizen's property, the court shall, in addition to adjudicating the civil claim of the person injured against the institution, enterprise, or organization, order a criminal investigation and the initiation of criminal proceedings against the offenders.[63]

[56] U.S.S.R. Laws 1935, text 73.
[57] *Id.* 1940, text 582.
[58] R.S.F.S.R. Laws 1940, text 6.
[59] *Id.* 1932, text 362.
[60] U.S.S.R. Laws 1925, text 445.
[61] *Id.* 1931, text 343; *id.* 1936, text 278.
[62] *Id.* 1937, text 285.
[63] U.S.S.R. Supreme Court, Plenary Session, Ruling of April 15, 1943, No. 8/M/4/Y; Civil Code (1943) 247.

[Soviet Law]

Shipping by rail, water, and air (by public carrier), is regulated by separate statutes: the Statute on Railroads of 1935,[64] the Code of Maritime Commerce of 1929,[65] the Code of Shipping on Inland Waterways of 1930,[66] the Air Code of 1935,[67] and special regulations.

The particular feature of the soviet law of shipping arises from the fact that the government is the sole public carrier of any consequence, that the bulk of cargo is government property, and that the annual governmental plan broken down by quarters and months dominates all consignments.[68] However, the governmental plan affects the shipping by rail, water, and air, in various degrees.

"The primary duty of the railroads," states the statute, "is the execution of the governmental plan for cargo and passenger transportation."[69] Consignments of goods are accepted by railroads in accordance with the plan,[70] and each consignor is assigned a monthly quota.[71] Plans for shipping of goods considered of nationwide importance (coal, oil, and the like) are made by the minister in charge of railroads, while for goods of local importance it is made by the chief of each railroad.[72] Thus, the soviet jurists conclude that at the present time consignment of goods for shipping by rail comes into being by virtue of the planned assignment

[64] U.S.S.R. Laws 1935, text 73. Prior statutes were enacted in 1920, 1922, and 1927.

[65] *Id.* 1929, texts 365, 366.

[66] *Id.* 1930, text 582.

[67] *Id.* 1935, text 359[a].

[68] 2 Civil Law (1944) 112 *et seq.*; Zimeleva, Civil Law (1945) 199 *et seq.* Any railroad cargo was declared to be on an equal footing with government property under the Law of August 7, 1932. For its translation see Chapter 16, p. 562 and Chapter 20, p. 728.

[69] Statute on Railroads, 1935, Section 1.

[70] *Id.*, Section 9.

[71] *Id.*, Section 12.

[72] Zimeleva, *op. cit.* 201.

itself and not by contract between the consignor and the carrier.[73] The rights and duties of both arise automatically from the plan and whoever fails to execute it is liable for penalties imposed by administrative action or under criminal law in court, in addition to damages payable to the other party.[74] But the soviet jurists think that any passenger transportation and carriage of goods by water or air arises by virtue of a contract of the consignor or passenger with the carrier.[75]

Some other particulars may be of interest. All shipping rates are established by central or local government,[76] and overcharge incurs criminal punishment.[77] Disputes involving overcharge are decided by the administration of the carrier concerned and are exempt from the jurisdiction of the courts and arbitral tribunals settling the disputes between governmental agencies.[78] For undercharged amounts the carrier may sue in court.[79] Claims of consignors or consignees for damages from the carrier may be filed with the court only after they are presented to the carrier and he either rejects them or fails to answer within a period of time specified by statute.[80] Assignment of such claims is not allowed under the soviet law.[81] Abridged periods of limi-

[73] *Ibid.*; 2 Civil Law (1944) 117 *et seq.*, also 112.

[74] 2 Civil Law (1944) 112; Zimeleva, *op. cit.* 202.

[75] *Id.* 129, 142, 149, 152; Zimeleva, *op. cit.* 208–211.

[76] *Id.* 113.

[77] U.S.S.R. Laws 1936, text 122.

[78] Statute on Railroads, 1935, Section 99; Maritime Code, Section 250; Code of Shipping on Internal Waterways, Section 170

[79] U.S.S.R. Supreme Court, Trial Division, Decision No. 293 of 1939; Dnepro-Dvina Steamship Line v. Gome Fuel Office, 2 Civil Law (1944) 114.

[80] Statute on Railroads, 1935, Section 99; Maritime Code, Section 249; Statute on Shipping by Inland Waterways 169; Air Code, Section 90, also U.S.S.R. Supreme Court, Plenary Session, Ruling of January 29, 1942, No. 3/7/Y

[81] 2 Civil Law (1944) 114.

tations apply to claims arising from shipping.[82] Special rules govern the disposal of unclaimed consignments.[83]

The soviet maritime law conforms to international standards more than any other branch of soviet law. The Soviet Union acceded to several international conventions concerned with maritime law. In view of the practical interest which may be presented by the standard salvage contract, drafted by the U.S.S.R. Chamber of Commerce and mandatory upon all soviet ships, a translation is given in Volume II, No. 24.

IV. Contracts in Foreign Trade

Foreign trade constitutes a government monopoly in the Soviet Union which is exercised by the Ministry of Foreign Trade. For a period of time, the government monopoly did not preclude the practice of issuing licenses to private persons or concerns, especially foreign, for the export and import of specified merchandise.[84] The issuance of licenses and establishment of rules of procedure are subject to the administrative discretion of the Minister of (prior to 1946 People's Commissar for) Foreign Trade.[85] Thus, although the general practice has been discontinued, there is no statutory obstacle to its restoration. Certain government quasi corporations are authorized to conduct foreign trade in some fields. This authority must be indicated in their charters. The U.S.S.R. Council of People's Commissars decreed on July 27, 1935, as follows:

> The People's Commissariat for Foreign Trade shall be per-

[82] See Vol. II. No. 2, comment to Section 44 of the Civil Code.
[83] Resolution of the U.S.S.R. Council of People's Commissars of January 5, 1944, No. 6.
[84] E.g., Rules for Issuance of Licenses (in Russian 1927) issued as a separate pamphlet.
[85] U.S.S.R. Laws 1933, text 354.

mitted to authorize the export, import, and mixed export-import, as well as transport, and trade combinations operating under its authority to enter, in the name of a given combination and within the limits of its charter, into legal transactions with foreign firms in the territory of the U.S.S.R. and abroad, as well as to issue bills and notes to foreign firms and to accept bills and notes from them in pursuit of such transactions.[86]

Special rules govern the signing of contracts and powers of attorney on behalf of soviet trading organizations engaged in foreign trade. The basic provisions of October 13, 1930, were amended several times.[87]

The gist of these rules is given by one soviet textbook as follows:

> The general rule is that contracts must be signed by two persons. Contracts made by trade missions (*torgpredstvo*) shall be jointly signed: (a) by the trade representative, his deputy, or, by authority of the trade representative, by the chief of a division of the trade mission, and (b) by a member of the staff of a given trade mission entered on a special list approved by the People's Commissariat for Foreign Trade and submitted to the U.S.S.R. Council of People's Commissars. The list of persons authorized to sign contracts shall be transmitted to the respective foreign government and published in an appropriate organ of the press of that country. Contracts made in violation of these rules are invalid.
>
> Along with these provisions, in a number of trade agreements made by the U.S.S.R., arrangement is also made for publication in the foreign local organs of the press of the names of persons authorized to sign. In such publications, the limitations of the powers of individual persons may be indicated, e.g., it may be noted that the given person may sign contracts only together with some other persons. Such publications make clear to the foreign parties dealing with the trade missions, who are the persons authorized to bind the trade missions by their actions.

[86] U.S.S.R. Laws 1935, text 367. Foreign Trade of the U.S.S.R. edited by Mishutin (in Russian 1928) 121–123, 136–137; Zhirmunsky, Organization and Technique of the Soviet Export (in Russian 1938) 186–189, quoted from Peretersky and Krylov 116.

[87] U.S.S.R. Laws 1930, text 583; *id.* 1932, text 119; *id.* 1933, text 54; *id.* 1934, text 178; *id.* 1936, text 459; Civil Code (1948) 132.

The Resolution of October 13, 1930, was changed by the Resolutions of the U.S.S.R. Central Executive Committee and Council of People's Commissars of December 26, 1935, and December 8, 1936. According to these resolutions, the trade representatives are authorized to sign independently, contracts involving in each case up to 400,000 rubles. A single signature on contracts involving sums exceeding this amount requires in each case a permit from the People's Commissar for Foreign Trade. Moreover, the above resolutions establish rules of procedure for the signing of contracts in the name of the soviet legal entities engaged in foreign trade. Contracts involving foreign trade made by such organizations in Moscow must be signed by two persons, one of whom must be the president of the organization or his deputy, and the other, a person authorized to sign contracts for foreign trade under a power of attorney issued by the president of the organization. Bills and notes and other financial obligations involving foreign trade and issued by a governmental legal entity in Moscow must bear the signatures of the president of the organization or his deputy and of the chief accountant of the organization. If the organization must execute a contract or issue bills and notes and other financial obligations outside of Moscow, whether in the U.S.S.R. or abroad, such contracts and instruments must be signed by two persons under an authorization signed by the president of the organization.

The names of persons authorized to sign contracts and financial obligations involving foreign trade are published in the organ of the People's Commissariat for (at present Ministry of) Foreign Trade: Foreign Trade (*Vneshnyaya Torgovlya*).[88]

The soviet jurists are of the opinion that "these provisions of soviet law must be considered applicable abroad," being binding not only upon the soviet agencies but also upon the foreign courts:

By these laws the limits of the powers of trade representatives and other soviet agencies engaged in foreign trade are clearly defined. Since the foreign court cannot establish the limits of these powers itself, inasmuch as it may not in general define the functional jurisdiction and the procedure of a foreign governmental agency, it is self-evident that a foreign

[88] Peretersky and Krylov 116–117.

court must base its decisions on the validity of contracts in foreign trade on the provisions of the soviet law.[89]

The so-called trade missions or trade delegations abroad (*torgpredstvo*) function as special agencies of the Soviet Union for the conduct of foreign trade. Their status was for a period defined by international conventions concluded by Soviet Russia with other countries,[90] but in 1933 a statute was enacted defining their status.[91] The trade missions are not legal entities. They are agencies of the soviet government, and a contract made by them is binding directly upon the soviet government.[92] If a contract is made by a soviet government organization enjoying the status of a legal entity in Soviet Russia, it is binding upon this organization only and the property assigned to such organization is alone liable for obligations incurred by it. The soviet jurists insist upon this point of view, which was also expressed in various international conventions made by Soviet Russia.[93] Therefore, argue the soviet jurists, no claim arising from contracts with a soviet trading organization which enjoys the status of a legal entity under the soviet law may be brought forward against the soviet government or its agency, the trade mission. No property not belonging to such organizations may, therefore, be attached. On the other hand, if the trade mission made

89 *Id.* 117.

90 E.g., with Lithuania, translated in Taracouzio, The Soviet Union and International Law (1935).

91 For its translation, see Vol. II, No. 23.

92 1 Civil Law Textbook (1938) 84; Peretersky and Krylov 114.

93 E.g., the Economic Convention with Germany of 1925, Article 9; the Provisory Trade Convention with Great Britain of 1934, Article 5; the exchange of notes of February 7, 1939, concerning supplementation of Article 3 of the Trade Agreement between the U.S.S.R. and Italy of 1924; the Trade Agreement with China of 1939, Article 12; Article 3 of the Annex to the Treaty with Bulgaria of 1940; and Article 7 of the Treaty with Iran of 1940. Peretersky and Krylov 84–85; Vedomosti 1940, No. 9.

the contract or expressly undertook the liability under such contract, the soviet State is thereby bound, and any of its property is liable under the obligation arising from the contract.[94]

By the Law of September 8, 1939, the People's Commissariat for Foreign Trade was granted the authority to restrict or prohibit export to individual countries, as a matter of repressive policy.[95]

V. Negotiable Instruments

1. Preliminary

As in many European countries, soviet law does not consolidate bills and notes together with checks under one concept as negotiable instruments. Bills and notes come under one statute, and checks under another. The first soviet statute on bills and notes was enacted on March 20, 1922, in the R.S.F.S.R.[96] and was followed by similar laws of the sister republics.[97] Prior to the credit reform of 1930, promissory notes were frequently used in the mutual transactions of the government trading agencies. Since then, under a prohibition of commercial credit between these agencies, no promissory notes are used in such transactions. At present bills and notes are, as a rule, used only in foreign trade.[98] For this reason, to make the soviet bills and notes uniform

[94] Peretersky and Krylov 116.

[95] U.S.S.R. Laws 1939, text 403.

[96] R.S.F.S.R. Laws 1922, text 285; amended: *Id.* 1923, texts 834, 882; *id.* 1924, text 490; *id.* 1925, text 346; *id.* 1926, text 76; *id.* 1928, texts 214, 797; *id.* 1929, texts 161, 798.

[97] E.g., Ukrainian Laws 1922, text 321. However, more or less uniform rules were established only after November 11, 1924. In the interim in the Azerbaijan Republic, the effect of the imperial statute of 1902 was restored. See Gordon, Bills and Notes, privately compiled code (in Russian 2d ed. 1926) xiii.

[98] 2 Civil Law (1944) 162.

with those of other European countries, the Soviet Union in 1936 adhered to the Geneva International Convention of 1930 on the Uniform Law on Bills and Notes, and a federal statute was enacted on August 7, 1937,[99] which replaced all the statutes of individual soviet republics. It embodies the provisions of the Uniform Law annexed to the convention and has the same number of articles (78). Very little use was made of the provisions of Annex II to the convention providing for possible deviations from the provisions of the model law.[100]

Checks were never regulated by statute under imperial law; the soviet statute on checks was enacted on November 6, 1928,[101] before the Geneva International Convention of 1931 on Checks, to which the Soviet Union did not adhere. This statute is still in force.

2. Bills and Notes

A bill of exchange or a promissory note must be designated as such in the body of the instrument, must indicate the time (year, month, and day of month) and place of its making, and must bear the signature of the

[99] U.S.S.R. Laws 1937, text 221.

[100] The soviet statute departed from the text appended to the convention only in the following points:

(1) Under Article 4 of Annex II, the following clause was added to Article 31, paragraph 1: "*Aval* may also be given by a separate instrument specifying the place where it is made."

(2) In Article 38 the last paragraph mentioning presentation to the clearing house was omitted (Articles 5 and 6 of Annex II).

(3) Article 45 provides for a simple notification by the holder to the payee and indorsee concerning nonacceptance or nonpayment, but the Statute on Notaries of 1930 and the Instruction for Notarial Offices of 1939 (see *infra*, note 122) provide for a formal procedure of notification through a notary public as outlined in Article 12 of Annex II.

(4) In Article 48 clause (4) is added permitting the collection of 3 per cent commission on a bill or note, in accordance with Article 14 of Annex II.

[101] U.S.S.R. Laws 1929, text 697.

maker. A bill of exchange must also contain an unconditional order by the maker to another person (drawee), requiring this person to pay to a third person (payee) or the maker a certain sum of money at a fixed or determinable future time as specified in the bill. The bill must also specify the place of the payment, but if not mentioned, the payment must be made at the residence of the drawee.[102]

A promissory note, on the other hand, must contain an unconditional promise by the maker to pay a certain sum of money to the person named therein, or his order, at a fixed or determinable future time as specified in the note.[103] In the event of a discrepancy between the sum stated in figures or spelled out, the latter is deemed to be correct and if several sums are spelled out, the smallest is deemed to be the correct one.[104]

The statute itself does not state the requirement that the sum payable under a bill or note must be expressed in U.S.S.R. currency. However, a restriction in this respect flows from the Act of January 7, 1937.[105] The monopoly of the U.S.S.R. over transactions in foreign exchange is established specifically "in instruments payable in foreign exchange (bills and notes, checks, money orders and the like)." Exception is made for transactions in foreign trade "made in accordance with special laws on this subject," for cases especially provided for by law, and for instances where an exception is made by the Ministry of Finance. From these provisions, it follows that ordinarily a bill or note may not be payable in foreign exchange, unless it is made by the U.S.S.R.

[102] U.S.S.R. Laws 1937, text 221, Section 1.
[103] *Id.*, Section 75.
[104] *Id.*, Section 6.
[105] U.S.S.R. Laws 1937, text 25. For translation, see Volume II, No. 2, comment to Section 24 of the Civil Code.

State Bank or the exceptional conditions stated above are present.

If a bill or note contains forged signatures, signatures of fictitious persons or persons incapable of issuing negotiable instruments, the defective signature does not affect the liability of those whose signatures are true and correct.[106]

If an instrument signed in blank is filled in contrary to an agreement, an objection to such defect may not be made against the holder unless he acquired it in bad faith or acted negligently in acquiring the instrument.[107]

The time of payment may be fixed for a day certain or upon presentment, or a specified number of days after presentment.[108]

Transfer of bills and notes is effected by indorsements on the back of the instrument or on a special slip attached thereto (*allonge*) either to order or in blank.[109] An indorsement to order may be also written on the face of the instrument.[110] An instrument with an indorsement in blank is transferred by delivery.[111] When the drawer has inserted in a bill the words "not to order" or an equivalent expression, the instrument may be transferred only in the form and with the effects of an ordinary assignment.[112] An indorsement must be unconditional. Any condition set up is deemed not to be written. A partial indorsement is null and void.[113] A regular indorsement transfers to the holder all rights

[106] *Lex cit.*, note 102, Section 7.
[107] *Id.*, Section 10.
[108] *Id.*, Section 33.
[109] *Id.*, Section 11.
[110] *Id.*, Section 13.
[111] *Id.*, Section 14.
[112] *Id.*, Section 11.
[113] *Id.*, Section 12.

flowing from the instrument and also makes the indorser liable for acceptance and payment before any subsequent holder.[114] He may, however, relieve himself of such liability by including a clause to this effect, such as "without recourse."[115] Moreover, an indorsement may be made using a phrase implying simple mandate (agency) such as "value in collection," "for collection" and the like, in which case the holder may indorse further only in his capacity of an agent. An indorsement implying pledge has the same effect.[116]

All makers and indorsers of a negotiable instrument are liable thereon jointly and severally.[117] An indorser in blank who has paid the note has recourse against all prior indorsers or against any one of them.[118]

Presentment of a bill of exchange for acceptance and consequences of nonacceptance as well as of the failure to pay a bill or a note are regulated in accordance with the Uniform Law on Bills of Exchange and Promissory Notes appended to the Convention of 1930.[119] To secure action against indorsers the nonacceptance and the failure to pay must be certified by means of protest, except against those who added to their indorsement a clause waiving this requirement.[120] Although the procedure of protest is outlined in the Statute on Bills and Notes of 1937 in conformity with the Uniform Law,[121] a more formal and strict procedure of protest is provided for

[114] *Id.*, Sections 14, 15.
[115] *Id.*, Section 15.
[116] *Id.*, Section 18.
[117] *Id.*, Section 47.
[118] *Id.*, Section 49.
[119] *Id.*, Sections 44–46.
[120] *Id.*, Sections 44, 46.
[121] Arts. 44–45 of the Uniform Law.

in the Statute on Notarial Offices of 1930 and the Instruction to these offices of 1939.[122]

Protest for nonacceptance is made by the notary of the place of domicile or residence of the drawee, protest for nonpayment by the notary of the place of payment.[123]

The following procedure is followed if a bill of exchange is to be protested for nonacceptance, if the date of acceptance is missing, in case of intervention for honor or protest for nonpayment of a bill or note payable within a term after presentment. The instrument must be presented to the notarial office before the day when the payment is due. The notary or his deputy presents the bill or note on the day of its receipt to the drawee (in the case of a note to the person liable) with the request to note on the bill the acceptance, or the presentment on the promissory note. If the drawee refuses to accept or fails to make the note of acceptance, the notary draws up on the same day the protest for nonacceptance and writes a note thereof upon the bill. The same procedure is followed if a person liable under a promissory note fails to note the presentment on a promissory note payable within a term after presentment.[124]

To protest nonpayment of a bill or note payable on a certain day or within a term after making or presentment, it must be presented to the notary on the day when the payment is due or within two working days immediately following this date. The notary or his deputy shall present the bill or note to the person liable within two working days immediately following the day when the payment is due. If the person liable refuses to pay

[122] Act of July 20, 1930, R.S.F.S.R. Laws 1930, text 476; Instruction of November 17, 1939 of the R.S.F.S.R. People's Commissariat for Justice Concerning Notarial Offices, Notarial Offices (in Russian 1942) 32.

[123] Instruction *cit. supra*, Sections 85, 89.

[124] *Id.*, Sections 85–88, 90.

or fails to make payment, the notary draws up a protest and notes this on the instrument.[125]

A protested instrument is subject to payment of the face amount, with interest at 6 per cent per annum plus 3 per cent commission (penalty) and costs. Levy of execution for debts arising from protested bills and notes is effected within one year by an execution clause written by a notary public on the instrument, after which it is subject to execution in accordance with the rules for execution of court judgments.[126]

3. Checks

Prior to November 6, 1929, there was no statute regulating checks in Russia. In the absence of statutory provisions dealing specifically with checks, the Ruling Senate, the Supreme Court of imperial Russia, construed a check under imperial law as merely an order given by the depositor to his bank to pay on his account a certain amount of money. In fact, checks were negotiated very little in Russia, and transfer by indorsement did not create any liability characteristic of indorsement of a bill or note;[127] it was no more than an

[125] *Id.*, Section 89.

[126] *Id.*, Section 68 *et seq.* The issuance of such execution clauses is regulated by acts cited in Chapter 23, note 43.

[127] The following decision of the Ruling Senate gives an outline of the law of checks:

> We have no general law concerning checks. The check transactions of the State Bank were admitted for the first time by the statute of this bank of 1860, in connection with the operation of current accounts (Sections 54–60 of the Statute on State Bank of 1860), and are carried along on the grounds of the statute of this bank now in force (General Code of Laws, Volume XI, Part 2, Statute on Banking, 1903 ed., Sections 150–152) and the regulations approved by the Minister of Finance; private banking establishments transact these operations upon the authority of their charters. Insufficiency of these provisions with regard to the juridical nature of check transactions and the mutual relations of the parties concerned is covered by the decisions of the Ruling Senate only to an extent. . . . Thus, in Decision No. 71 of 1900, it was stated: 'It is correct to assume that the fact of the issue of a check proves the existence of an effective obligation of the drawer to

ordinary assignment of a claim. Professor Shershenevich, noted authority on commercial law, summarized the situation as follows:

> The transfer of a check has a significance in Russian law which is different from that in Western European legislation. The transfer of a check payable to bearer is made by delivery in Western Europe as well as in Russia, and does not produce any legal consequences. On the contrary, the transfer of order checks by indorsement establishes in Western Europe the responsibility of all indorsers similar to that of an indorser of a promissory note or bill. It is necessary to deny such a responsibility of the indorsers of checks issued in Russia, because such a responsibility may be established only by law. Insofar as one could trace our practice it does not recognize the transfer of checks by indorsement.[128]

It is true that issuance of checks belongs to what the imperial law called "mercantile transactions" to which, in the absence of statutory provisions, the rules of trade customs could apply.[129] However, no trade customs comparable to the Western European provisions became established in Russia before the Revolution.

After the establishment of the soviet regime, the practice of issuing checks was resumed around 1921, but, until the enactment of the above Statute of November 6, 1929, which went into force on January 15, 1930,[130] checks in soviet law retained the characteristics devel-

make a certain payment to the holder. In essence, a check is an order to the cash office of a bank, where the drawer has a current account and it serves chiefly for discharge of drawer's debt to the payee as one of the instruments of payment purported to discharge the obligation.' Ruling Senate, Civil Cassation Division, Decisions No. 63 of 1905 and No. 71 of 1900. See also No. 110 of 1881, No. 114 of 1892, No. 8 of 1896, No. 67 of 1910, and No. 45 of 1912.

[128] Shershenevich, 2 Course of Commercial Law (in Russian 4th ed. 1908) 499; see also Rosenberg, Concerning the Proposed Russian Check Law (in Russian 1917) 23 *et seq.;* Fedorov, Commercial Law (in Russian 1911) 724 *et seq.*

[129] Commercial Code, Section 1, Commercial Code of Procedure, Section 43, Svod Zakonov, Vol. XI (1893 ed.).

[130] U.S.S.R. Laws 1929, text 697.

oped under the imperial law.[131] The Soviet Union has not adhered to the International Geneva Convention on a Uniform Check Law of 1931, and the provisions of the Statute of November 26, 1929, which is still in force, depart in some points from the Uniform Law appended to the Convention of 1931.

A check is defined in the soviet statute conforming to the Uniform Law as a written order drawn on a bank requesting it to pay the bearer or named payee a certain sum of money. Likewise, a check must contain: the place and the date of making; the name of the drawee who must be a bank; the designation of the instrument as a check written in the same language as the text of the check; an unconditional order to pay a certain sum; and the signature of the maker. However, there are additional requirements: the sum of money and the month of making must be spelled out and written by hand; the check must also contain the identification of the account from which the payment is to be made; and no correction of the text of the check is allowed.[132] As a general rule, only checks written on blanks issued by the bank are used in the Soviet Union.[133]

As under the Uniform Law, checks may be made payable to a person named, or to order, or to bearer. If the payee is not indicated, the check is considered to be made payable to bearer.[134] Checks made to bearer are negotiated by delivery.[135] A check payable to a specified person may not be transferred by indorsement but only by ordinary assignment. An indorsement in such instances

131 Eliasson, The Check Law (in Russian 1927) 16 *et seq.*
132 *Lex cit. supra,* note 130, Sections 1 and 2.
133 2 Civil Law (1944) 171.
134 *Lex cit. supra,* note 130, Section 4.
135 *Id.*, Section 5.

does not invalidate the check or the transfer but, nevertheless, does not produce the specific responsibility arising on an indorsement of a bill or note. It has the effect of an assignment subject to the rules of the Civil Code.[136] Only checks payable to order are negotiated by indorsement which, in these instances, is subject to the same rules as indorsement of bills and notes. Such indorsers are jointly and severally liable for the payment of the check. However, the indorser may free himself from such liability by inserting in the indorsement "without recourse" or any similar expression.[137] Likewise, no guarantee of payment is attached to an indorsement specified as indorsement "for collection," "value for collection," "by procuration," or containing any similar clause expressing a mandate. The person to whom the check is transferred by such indorsement may make further transfers only in the capacity of an agent. The original indorser may, however, prohibit any further transfer.[138] The indorsers of a check payable to bearer incur liability for payment.[139] The soviet statute allows the issuance of so-called crossed checks payable only to a bank or a specified bank [140] and checks payable "in account," which can be settled by the drawee only by transfer from one account to another or by means of another bookkeeping transaction and not by payment in cash.[141]

In contrast to the rule of the Uniform Law of 1931, the soviet law permits acceptance of checks. Such ac-

136 *Id.*, Section 7.
137 *Id.*, Sections 6, 21, 22.
138 *Id.*, Section 8.
139 *Id.*, Section 22.
140 *Id.*, Section 9.
141 *Id.*, Section 10.

other government banks especially authorized by the U.S.S.R. Ministry of Finance.[142]

The soviet statute specifies the period of time within which the check must be presented for payment. Checks drawn in the Soviet Union must be presented within ten days, not counting the day of making;[143] checks drawn abroad but payable in the Soviet Union must be presented within six months.[144] If the check is presented on the next day after the expiration of these terms through a notarial office, it must be paid.[145] The same periods of time must be observed to keep the indorsers liable for payment.[146]

The drawer is liable for damages caused by the payment of a lost or stolen check, unless it is proved that the check was paid through intention or negligence of the drawee.[147] Damages caused by payment of a forged check are borne by the party by whose intention or negligence the check was paid. If the check was drawn on a blank issued by the bank, as is the most common case in the Soviet Union, the drawer is liable unless he proves the fault of the drawee. Otherwise, the drawee is liable unless he proves the fault of the drawer.[148]

The soviet law applies to checks drawn abroad but payable in the Soviet Union with the following exceptions: (a) the formal requirements of checks or an obligation under a check are determined by the place of making the check or establishment of such obligation, however, it suffices if the form is consistent with the soviet law; (b) the check must be presented for payment

[142] *Id.*, Sections 13–16.
[143] *Id.*, Section 11.
[144] *Id.*, Section 3 and Section 4, subsection (b).
[145] *Id.*, Section 11, paragraph 3.
[146] *Id.*, Section 23.
[147] *Id.*, Section 29.
[148] *Id.*, Section 30.

within six months.[149] The capacity of being a drawee of a check drawn in the Soviet Union but payable abroad is judged under the law of place of payment; the form of such checks is judged under the soviet law but fulfillment of the requirements of the law of place of payment suffices.[150] Capacity of the drawer is judged under the national law of the drawer. If his national law refers to the law of the place of making, the latter governs. A person incapable under his national law is, nevertheless, liable under a check if such person is capable under the law of the place where he undertook the obligation.[151]

The right of a holder of the check to demand payment from any person liable on the check is barred upon expiration of three months from the date on which the drawee refused payment.[152] The right of an indorser who made the payment to redress from any other party liable on the check is barred upon expiration of three months from the date of payment. Upon expiration of three years from the refusal of the drawee to pay, all claims whatsoever on the check are barred.[153]

[149] *Id.*, Section 34.
[150] *Id.*, Section 35.
[151] *Id.*, Section 36.
[152] *Id.*, Section 33.
[153] *Id.*, Section 33; also Civil Code, Section 44.

Chapter 14

Torts: Theory of Liability

I. General Survey

1. Preliminary

Liabilities corresponding by and large to torts in Anglo-American law are covered by the chapter of the soviet Civil Code entitled "Obligations Arising From Injury Caused to Another" (Sections 403–415). The views of the soviet jurists as to the origin and nature of the provisions of this chapter are far from unanimous. In the early days these provisions caused, according to Stuchka, "as specifically 'soviet sections,' a particularly sentimental feeling in many comrades who seem to apply them regardless of whether or not they fit the case in point."[1] Thus, the R.S.F.S.R. Supreme Court found it necessary to remind the courts in 1926 that "Section 403 is by no means peculiar to soviet law, as the courts have often indicated in their decisions, but has been borrowed from the civil law of capitalist codes (e.g., the French Code)."[2] To this Goikhbarg, the principal compiler of the Code, objected that:

Section 403 is certainly peculiar to soviet law; it could not have been borrowed from any of the capitalist codes because the capitalist codes are based *in principle* upon liability for *fault*

[1] Stuchka, "Review of the Volfson Textbook of Civil Law" (in Russian 1927) Revolution of Law, No. 2, 123.

[2] R.S.F.S.R. Supreme Court, Plenary Session Ruling of June 28, 1926, Protocol No. 10, quoted at length *infra*, Chapter 15 at note 9.

only, while Section 403 establishes liability on the principle of mere causation.[3]

Neither of these views can be accepted as correct. Though some of the soviet provisions are novel, the chapter as a whole is akin to the provisions dealing with liability for injuries caused by civil wrongs (unlawful acts) in Continental European codes. They are comparable to the provisions governing *unerlaubte Handlungen,* Articles 823 and following of the German Civil Code; *responsabilité civile* under Articles 1382 and 1383 of the French Civil Code; *actes illicites* under Article 41 of the Swiss Code of Obligations; *fatti illeciti* under the Italian Civil Code, Articles 1152 *et seq.* of the Code of 1881 and Articles 2043 *et seq.* of the 1942 Code.

On the other hand, the influence of some provisions of the imperial Russian law and of the doctrines of prerevolutionary Russian legal writers, may be traced in the clauses of the soviet Code and their interpretation by the soviet jurists. These Russian elements were blended with certain modern European trends in the law of liability for damage and with the general social aims of soviet legislation. Thus, the soviet law of torts is both similar to and different from the European capitalist legislation. Nor has it remained unchanged since 1923, when the Civil Code became effective. The doctrines of the soviet legal writers and the decisions of the courts show substantial changes in the interpretation of the unchanged and rather meager provisions of the Code. In the 1920's, soviet commentators on the Code read into these provisions principles different from those which they later enunciated in 1938 or 1939. The final general trend has been to develop the traditional ele-

[3] Goikhbarg, Course of Civil Procedure (in Russian 1928) 34, note 1.

ments. Some of the novelties have found very limited application.

2. Specific Features of Torts in Soviet Law

Certain features of the soviet law of liability for tortious injuries will undoubtedly appear striking to a non-soviet jurist, be he a civil or common law lawyer.

First is the way in which the fault of the tortfeasor is treated in statutory clauses and in their interpretation (Sections 403 and 404; see *infra* II, 1 and 5).

Second, the consequences of contributory negligence, as developed by the soviet courts, are at variance with the common law but follow Western European and Russian prerevolutionary trends (see Chapter 15, I).

Third, the role of property status of the parties in the determination of liability (Section 406) and of the amount of damages (Section 411) is novel (see Chapter 15, II).

Fourth, the liability of the government treasury for damage caused by public officials appears strictly limited (Sections 407, 407*a*; see Chapter 15, III, 5).

Fifth, the claim for damages for bodily injury is personal; in consequence, only in case of the death of the person injured may his actual dependents institute action (Section 409; see Chapter 15, V, 2).

Sixth, the amount of compensation for the loss of earning power is limited in accordance with the rates of compensation payable as social insurance in similar cases (Section 413; see Chapter 15, V, 1).

Seventh, damages may be claimed in criminal proceedings. In this respect, the soviet law has followed the pattern of the Russian imperial law inspired by that of France. The claim for damages caused by a crimi-

nal offense may be presented in the course of criminal proceedings instituted to prosecute the offense. The criminal trial court may in its sentence rendered in the criminal case reject or satisfy the claim. It may also recognize the duty of the defendant to pay the compensation and leave to the civil court the determination of the amount of damages. In all such cases, the person injured does not pay any dues and fees incidental to the civil suit. If the person injured fails to present his claim in the course of the criminal proceedings, he is not precluded from filing a separate civil suit (Code of Criminal Procedure, Sections 329, 330; for translation, see Volume II, No. 44, comment to Section 10, Code of Civil Procedure).

Eighth, special rules cover the responsibility of an employee for damage caused to his employer in the discharge of his duties. They are contained in Section 83–83 [4] of the Labor Code (see Chapter 22, VI; Volume II, No. 41).

Ninth, the interests of the State enjoy special protection in all cases (see Chapter 15, III, 5).

II. General Theory of Liability

1. Statutory Provisions

Roman law failed to evolve a general concept of liability for unlawful acts, offering remedies only for specific kinds of such acts. However, beginning with the General Prussian Code (*Allgemeines Preussisches Landrecht* of 1793), the modern European codes, French, German, Swiss, Italian, and the American codes in jurisdictions based on the civil law, contain general clauses establishing liability for unlawful acts, in addition to specific provisions. The soviet Code fell in line

with this tradition and has gone even further. In Sections 403 and 404 it offers a general formula with respect to liability for tortious injury without contemplating specific instances. Section 403 covers generally most situations. Section 404 provides for cases of so-called special hazard. These sections read:

403. Anyone causing injury to the person or property of another must repair the injury caused. He is relieved from liability, if he proves that he could not prevent the injury, or that he was privileged to cause the injury, or that the injury arose as a result of the intent or gross negligence of the person injured.

404. Individuals and enterprises whose activities involve increased hazard for persons coming into contact with them, such as railways, tramways, industrial establishments, dealers in inflammable materials, keepers of wild animals, persons erecting buildings and other structures, and the like, shall be liable for the injury caused by the source of increased hazard, if they do not prove that the injury was the result of *force majeure* or occurred through the intent or gross negligence of the person injured.

The soviet formulas in Sections 403 and 404 of the Civil Code are in a way different from the European and American analogues of these sections.[4] It is common

[4] French Civil Code:

Art. 1382: Any act whatever done by a man which causes damage to another obliges him by whose *fault* the damage was caused to repair it.

Art. 1383: A man is responsible for the damage which he has caused, whether by a positive act, or by his negligence or imprudence.

Translated by Maurice Sheldon Amos, Introduction to French Law (1935) 213.

Austrian General Civil Code:

Art. 1295: Anyone is entitled to claim compensation from him who caused an injury *by his own fault*. The injury may be caused by violation of a contract or without any relation to the contract.

German Civil Code:

Art. 823: A person who *willfully or negligently*, unlawfully injures the life, body, health, freedom, property, or any other right of another, is bound to compensate him for any damage arising therefrom.

A person who infringes a statutory provision intended for the protection of others incurs the same obligations. If according to the preview of the statute, infringement is possible even without any fault on the part of the wrongdoer, the duty to make compensation arises only if some *fault* can be imputed to him.

principle in all the nonsoviet codes that they hold liable only such persons as have caused damage by their fault in one form or another (intent, negligence, imprudence). As the Louisiana Supreme Court once observed, "the word 'fault' is emphatic." [5]

But this very word is missing in the general soviet formula stated in Section 403 of the Civil Code: "Anyone causing injury to the person or property of another must repair the injury caused." However, this rule is followed by a reservation which makes the whole of the section ambiguous: "He is absolved from liability, if he proves that he could not prevent the injury or that he was privileged to cause the injury, or that the injury arose as a result of the intent or gross negligence of the person injured." As Stuchka, the soviet writer, has remarked, the second part somewhat contradicts the first. This contradiction cannot be attributed to oversight or accident. The principal framer of the soviet Code,

Art. 826: A person who *willfully* causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage. (Translated by Wang.)

Polish Code of Obligations, 1933:

Art. 134: Whoever by his *fault* causes injury to another shall be liable to repair it.

Art. 135: Whoever *intentionally* or by *negligence* causes injury to another in the exercise of his right shall be liable to repair it, if he exceeded the limits determined by good morals or the purpose for which the right was enjoyed by him.

California Code:

Section 3381: Every person who suffers detriment from the unlawful act or omission of another, may recover from the *person in fault* a compensation therefor in money, which is called damages.

Louisiana Code:

Article 2315: Every act whatever of man that causes damage to another, obliges *him by whose fault* it happened, to repair it. . . .

Italian Civil Code of 1942:

Art. 2043: Every act whatever, whether *intentional* or *negligent*, which inflicts unjust damage upon another, shall obligate him who committed the act to repair the damage.

Art. 2044: One who inflicts damage in self defense or in justifiable defense of another shall not be liable for it.

[5] Donovan v. New Orleans, 11 La. Ann. 711.

Goikhbarg, was distinctly an opponent of the doctrine of fault.

2. Doctrine of Fault and Its Criticism in Western Europe

In general, this doctrine has been strongly criticized by many German and French jurists since the 1880's.[6] With the advent of the mechanized age, the doctrine of fault as the basis of liability has been declared by many to be inadequate to meet the requirements of equity and justice. It has been pointed out that many new machines and devices widely used in industry, transportation, and everyday life are bound to cause numerous accidents, which even under a most exacting principle of judgment cannot be attributed to the fault of their owners. And yet it has seemed to be unjust to deny the victims compensation. Courts have sought to stretch the notion of guilt to the extent of a real fiction; for instance, a Bavarian court once declared that the mere use of a locomotive which throws sparks constitutes a fault.

In many instances, legislation has solved the problem. Statutes have appeared making the owners of certain enterprises, such as railways, factories, and steamship lines, liable for damage arising from danger incidental to their activities, regardless of the fault of their own-

[6] German: Mataju, Das Recht des Schadenersatzes vom Standpunkt der Nationalökonomie (1888); Gierke, Die sozialen Aufgaben des Privatrechts (1889) 33; Unger, Handeln auf eigene Gefahr (1893) 134 *et seq.*; Rümelin, Schadenersatz ohne Verschulden (1910) 74; Binding, 1 Die Normen (1890) 310, 473; Steinbach, Die Grundsätze des heutigen Rechts über den Ersatz von Vermögensschaden (1888) 87; Hedemann, Die Fortschritte des Zivilrechts im 19 Jahrhundert (1910) 81–82, and literature there cited; Bienenfeld, Haftung ohne Verschulden (1933). See also notes 10–14 *infra*.

French: Saleilles, Les Accidents du travail (1897); Josserand, La Responsabilité du fait des choses inanimées (1897). A most enlightening exposé of the French doctrine and French decisions is given by Sir Maurice Amos and Walton, Introduction to French Law (1935) 262 *et seq.*

ers. The constructive liability of innkeepers for the safety of things brought in by customers as provided for in Roman law served as a prototype, i.e., the owners were exempt from liability only in case of *vis major* or the fault of the person injured. First appeared the laws concerning the railways.[7] These were followed by laws on compensation for industrial accidents.

However, doubt respecting the justice of the principle of fault having once arisen, there resulted a tendency to abandon this principle and to return to mere causation of injury as sufficient ground for holding the tortfeasor liable. Thus, in France, where the law of tortious liability developed primarily through *jurisprudence*—court decisions—the doctrine of *le risque créé* gained recognition. According to this doctrine, the person who for his own profit or pleasure creates a danger to his neighbors is responsible for the resulting damage, whether he was at fault or not.[8]

The doctrine of Unger was similar: that whoever acts must bear the risk of any fortuitous results of his action.[9] Others saw in the liability a corollary of an actively pursued interest (Merkel)[10] or a consequence of the creation of an extra hazard—*Gefährdungsprinzip* (Rümelin).[11] However, in no country has the doctrine

[7] Prussian, 1838; Austrian, 1869; imperial German, 1871; Swiss, 1875; imperial Russian, 1851 and 1878.

[8] Sir Maurice Amos and Walton, An Introduction to French Law (1935) 262 (court decisions and authors cited).

[9] Unger, Handeln auf eigene Gefahr (1893); *id.*, Handeln auf fremde Gefahr (1894).

[10] Rudolf Merkel, Die Kollision rechtmässiger Interessen und die Schadenersatzpflicht (1895).

[11] Max Rümelin, Schadenersatz ohne Verschulden (1910) 74; M. Rümelin, Die Gründe der Schadenzurechnung (1896). A detailed analysis of the German theories was given in Russian by I. A. Pokrovsky, "Repair of Damage and Distribution Thereof" (1899) 29 Vestnik (Messenger) of Law No. 9, 1 *et seq.*, and Krivtsov, General Doctrine of Damages (in Russian 1902) 56 *et seq.*

of causation gained ground as a general rule applicable to all instances of causing damage to another. In Germany, Austria, and in Russia before the Revolution, two different sets of rules were established, one for injuries caused by railways, steamships, factories, et cetera, and another for all other instances of injury.

3. Early Soviet Theory

The framers of the soviet Code, though undoubtedly in sympathy with the doctrine of causation, still followed the same distinction but also introduced a novelty. Section 403 deals with injuries in general. But Section 404, instead of declaring the responsibility of specific types of enterprises (e.g., railways and steamship lines, as under Section 683 of Volume X, Part 1, of the imperial *Svod Zakonov*), introduced the general concept of a higher responsibility for "increased hazard" in the case of persons employing the "source" of such hazard. They excluded the requirement of fault in such cases of increased hazard. The holder of the "source" is liable for damage caused by the increased hazard whether he is to blame or not. His only defense is to prove that "the injury was the result of *force majeure,* or occurred through the intent or gross negligence of the person injured" (Section 404).

However, with regard to injuries other than those attributable to increased hazard, the compilers of the soviet Code, as remarked by a soviet writer, though having the good intention of getting rid of the doctrine of fault, timidly resorted to an ambiguous wording.[12] In fact, they repeated, strange as it may be, the ambiguity

[12] Gomberg, "Liability Without Fault Outside a Contractual Relation Under the Civil Code" (in Russian 1927) Law and Life No. 1, 13.

of the imperial Russian statutory clause on liability for tortious injury. A comparison of the successive changes in soviet interpretations of the soviet clause on tort liability with the same process in the prerevolutionary Russian law, discloses an interesting phenomenon. The doctrine of fault holds its ground.

4. Torts in Imperial Russian Law

The imperial Russian statutory provisions were somewhat different from the provisions of the Western European codes quoted above under 2. The law on liability for civil injury was enacted in 1851 and incorporated as Sections 644–682, 684–689 into the Civil Laws (Volume X, Part 1, of the *Svod Zakonov*, General Code of Laws). These sections formed two separate chapters: one dealing with damage arising from criminal offenses and another treating noncriminal acts. With regard to the damage caused by criminal offenses, the provisions were clear. Section 644 imposed upon any offender the duty "to compensate for any injury or damage caused directly by his act." But Section 647, placed in the same chapter, stated that:

> 647. No compensation shall be made for injury or damage arising from an accidental act, committed not only without any intent but also without any negligence whatsoever on the part of the one who committed it.

Thus, a criminal was not liable for damage caused accidentally.

The basic provision in the chapter dealing with damages for acts which are not criminal offenses was as follows:

> 648. Anyone is liable to compensate for injury and damage caused to another by his act or omission, even though such act

or omission does not constitute a crime or minor offense, if it is proved that his conduct was not compelled by a command of law or government, by self-defense, or by the coincidence of circumstances which he could not prevent.

This clause has the same ambiguity as the soviet Section 403. Fault is not mentioned. It raised a controversy among the legal writers. Some of them, the older and more conservative (Pobedonostsev, Anenkov, Guliaev), insisted that Section 647 quoted above, which relieved from liability for fortuitous events, was not applicable to acts that do not constitute criminal offenses. Pobedonostsev argued that, unlike the criminal law, the private law may hold a person liable without fault for an accident or a fortuitous event. He stated:

> In a way, liability under our private law admits no fortuitous event. An act though unintentional as to its consequences, and not committed on purpose, cannot be considered a pure accident, because an accident is a totally involuntary occurrence, while every human act is always dependent on human will. Therefore one who by his act inflicts injury on the property of another, though not on purpose, transgresses another's sphere of rights and must compensate the owner, although no fault may be attributed to him.[13]

Against this point of view, others (Shershenevich, Mayer, and the compilers of the Draft of a Civil Code) objected that such an interpretation contradicts the general spirit of the Russian statute. If the law absolves a criminal from liability for accidental damage, it could not impose such liability upon a person who caused damage by a noncriminal act. The advocates of this opinion referred also to the materials pertaining to the

[13] Pobedonostsev, 3 Course in Civil Law (in Russian 1896) 602; Annenkov, 1 System of the Russian Civil Law (in Russian 1894) 532; Guliaev, The Russian Civil Law (Russian 4th ed. 1913) 489; Krivtsov, General Doctrine of Damages (in Russian 1902) 82, 95, 117 *et seq.*; Gussakovsky "Damages for Torts" (in Russian 1912) Zhurnal (Journal) of Ministry of Justice No. 8, 5–12.

deliberations preceding the law of 1851, showing that the framers of the law contemplated that Section 647, absolving from liability for accidental damage, should be applied in all cases and not only to cases of damage caused by crimes. Finally, it was remarked, the concluding clause of Section 684, absolving from liability where one "could not prevent," implies, as the presupposition of liability, that the person responsible could prevent the damage but failed to do so; in other words, is at fault.[14] In any event, the Supreme Court of imperial Russia in a series of decisions took the point of view that liability for damage requires fault on the part of the person who caused the damage.[15] Thus confronted with the interpretation of an ambiguous statutory provision, the imperial Russian jurists initially repudiated the doctrine of fault but eventually admitted it, and the latter doctrine was followed by the imperial courts. Moreover, the three successive drafts of a new civil code, prepared in the course of many years of work (1899–1913), after a thorough study of Russian cases and Western European laws, proposed the general rule that liability arises only for acts committed "intentionally or by negligence."[16] Thus, the doctrine of fault held its ground prior to the Revolution.

5. Early Soviet Views; Tort Without Fault; Crime Without Guilt

It seems that, with the promulgation of the soviet

[14] 5 Draft of the Civil Code, Book 5, Obligations (in Russian 1899) 444; Shershenevich, 2 Textbook of Civil Law (Russian 11th ed. 1915) 231; Mayer, Civil Law (in Russian 1864) 203; *id.* (1894) 170.

[15] Ruling Senate, Civil Cassation Division, Decisions: 1873, No. 407; 1874, No. 34; 1875, No. 9; 1876, No. 114; 1881, No. 174; 1881, No. 144; 1900, No. 62; 1906, No. 31.

[16] Final draft, 1913, Section 2601; first draft, 1899, Section 1065; intermediary draft, 1903, Section 1036.

Civil Code, history was to repeat itself. Interpreting the ambiguous clauses of Section 403, Goikhbarg declared in 1923: "Our Code does not view the fault of the person causing the injury as essential for the imposition of liability." [17] This view was shared by many; the doctrine of "naked" causation appealed to soviet jurists as the last word of social justice in the "capitalist" jurisprudence. They assumed that "compensation for injury is, generally speaking, an institution beneficial to the workers" and therefore concluded:

> It is necessary to give extensive interpretation to the liability of the person causing the injury (except where the liability of the State is involved), and a narrow construction to rules permitting the defendant the escape liability.

The same author suggested to the court that, under Section 403:

> The plaintiff must show: (1) that his person or property suffered an injury and (2) that the injury was caused by the defendant. Beyond that he need not show anything.[18]

The opponents of the doctrine of fault tried to link their view with current soviet doctrines of criminal law. Thus, Goikhbarg argued:

> Since, in our criminal law, fault has been excised as a basis for criminal responsibility, still less could it be accepted as the sole basis of civil liability.[19]

However, this argument appears to be erroneous. It is true that for a time, from 1922 to 1930, the principle

[17] Goikhbarg, 1 Economic Law (in Russian 1923) 122.

[18] Raevich, "The Law of Compensation for Injury" 3 The R.S.F.S.R. Civil Code, a Commentary, edited by Goikhbarg and Koblents (in Russian 1924) 87, 88; (1925, one vol. ed.) 435, 436. For a bibliography of soviet works supporting the same view, see Varshavsky, Obligations Arising From Causing Injury (in Russian 1929) 74–75, which is the best monograph that has appeared in Soviet Russia so far.

[19] *Op. cit.*, note 17 (3d ed. 1924) 169.

of fault and guilt was unpopular with soviet jurists concerned with the criminal law. This principle was considered by soviet theorists as an expression of the idealistic, free will philosophy, incompatible with the deterministic philosophy implied in Marxism. An attempt was made to get rid of such terms as crime and punishment in soviet legislation. The Federal Principles of Penal Law of 1924 and the penal codes of the soviet republics of 1926 used the terms "socially dangerous acts" in reference to crime, and "measures of social defense" to denote punishment, the latter term covering even the death penalty. However, the construction given to these concepts did not differ from the traditional definitions of crime and punishment. "Socially dangerous acts" were subject to "measures of social defense" as a rule, if the perpetrator was held responsible for his actions in general (R.S.F.S.R. Criminal Code, Section 10) and also "acted with criminal intent . . . or negligence" (*id.*, Section 11), i.e., is guilty. As a soviet writer correctly remarked in 1927:

> The result of the "abolition of punishment" [in the soviet law] was merely a very radical reform in terminology, but it did not affect the substance of repression. We abolished punishment, but there is a crime. There is a crime, but guilt is abolished. Guilt is abolished, but we recognize criminal intent and negligence . . . which makes no sense whatsoever, unless we accept in advance the idea of guilt.[20]

By 1935 this view was accepted even by the most ardent advocates of the elimination of guilt from soviet law,[21] and in 1937 the whole earlier trend was condemned as

[20] Staroselsky, "Principles of Construction of Penal Repression in the Proletarian State" (in Russian 1927) Revolution of Law No. 2, 92.

[21] Krylenko, "The Draft of the U.S.S.R. Civil Code" (in Russian 1935) Soviet State Nos. 1–2, 94. See also (1935) Soviet Justice No. 11, 21. See also note 49, Chapter 7, *supra*, at p. 247.

a subversive misinterpretation of soviet law and Marxism.[22] The recent soviet laws containing penal clauses invariably use the terms guilt, crime, and punishment.[23] Thus, no support for the elimination of fault from civil liability may be drawn from the soviet criminal law.

There are instances in which, under the soviet Criminal Code, an innocent person may be penalized in court, but no conclusion may be drawn from these provisions for torts. Thus, under Section 1[3] of the federal Code of Political Crimes (Section 58[1c] of the R.S.F.S.R. Criminal Code) enacted on June 8, 1934, if a man in military service takes flight abroad by air or otherwise, in peace as well as in wartime, the adult members of his family who had knowledge of his plans are subject to imprisonment for from five to ten years plus confiscation of property, but those who had no such knowledge, though living with him or dependent upon him, are subject to exile to remote localities of Siberia for five years. But in these instances there is no causal connection between the acts of such relatives, or dependents, and the possible damage which is the condition of liability for tort under the Civil Code.

After all, Goikhbarg himself gave a good example of the impossibility of a consistent application of the principle of "naked causation." It does not suffice, he says, to establish liability, if the person directly causing the injury is a mere instrument. For instance, one who was pushed and fell over a case filled with fragile glass,

[22] Mankovsky, "Against the Anti-Marxist Theories in Criminal Law" (in Russian 1937) Socialist Legality No. 7; Vyshinsky, "Notes on the Situation on the Front of Theory of Law" *id.* and also (1937) Soviet State Nos. 3–4. For an account of the cleansing of the soviet theory of penal law, see Hazard, "Reforming Soviet Criminal Law" (1938) 29 Journal of Criminal Law 157.

[23] E.g., U.S.S.R. Laws 1934, text 255.

breaking it, cannot be held liable for damages by the owner of the glass.[24]

6. Final Acceptance of the Theory of Fault by Soviet Law

In any event, the soviet courts did not follow the advice of the advocates of liability without fault. Where it came to adjudication of actual cases and the giving of reasons for decisions, the courts invariably resorted to fault. Either fault was invoked explicitly, or the decision of the case was actually based on the principle that there is no liability unless there is fault.[25] The acceptance of the doctrine of fault may be designated as the latest general trend of the soviet law of liability for tortious injury.

The soviet textbook of 1935 on private law seems to be the latest attempt to resist this trend by means of a new construction. The authors sought to present liability for damage as a substitute for social insurance for uninsured persons:

> Repair of injuries by individual liabilities under the soviet Civil Code is in the nature of a supplement to the system of social insurance and is regulated by adapting the principles of the latter . . . where the injury is not covered by it.[26]

The provisions of the soviet Civil Code do not warrant such a conclusion. It is true that, in instances of

[24] Goikhbarg, *op. cit.*, note 19, 173, 174.

[25] For cases, see Varshavsky, *op. cit.*, note 18, 72–73; also Gomberg, *op. cit.*, note 12, 15 *et seq.* The R.S.F.S.R. Supreme Court once stated on May 18, 1925, that "liability under Chapter XIII of the Civil Code is not based upon fault," but this was an obvious *obiter dictum.*

[26] Gintsburg, 1 Course 401, 403. A similar point of view was expressed in the Resolution of the R.S.F.S.R. Supreme Court, Plenary Session of April 2, 1928, No. 7, as an *obiter dictum.* However, this resolution has not appeared in the annotated editions of the soviet Civil Code since 1941.

soviet law limits the amount of damages by the rates payable in similar cases as social insurance (Section 415), but there is no social insurance against damage to property in Soviet Russia. The recent soviet textbooks of 1938 and 1944 are right in discarding this characteristic of soviet law as erroneous. The entire general discussion of the role of fault in these textbooks appears to be inspired by the best essay in Russian on the topic, which appeared on the eve of the Revolution. It is the chapter on damages for injury in Professor I. A. Pokrovsky's *Basic Problems of Civil Law* (1917) (see p. 208ff. *supra*). The textbooks concurrently state:

> In the history of presocialist law, causation as the basis for civil liability for injury preceded the principle of fault. The appearance of the concept of fault was in its time a distinct progress. It signified the abandonment of primitive forms of liability. Primarily under the influence of Roman law, which based liability upon the principle of fault, the modern capitalist legal systems founded liability on the same basis, admitting liability without fault only in separate special instances. . . . In Germany, the principle of causation was replaced by that of fault as a result of the reception of Roman law. Otto von Gierke, whom the "jurists" of fascist Germany consider their predecessor and teacher, in criticising the draft of the German Civil Code of 1899, opposed the principle of causation as the "national Germanic" principle against the foreign Roman influence. Toward the end of the past century, the doctrine of causation gained wide following among the civil law writers.[27]

The textbooks proceed with an analysis of the argu-

[27] 2 Civil Law Textbook (1938) 392–393; 1 Civil Law (1944) 323 from which the third sentence is taken. It is interesting to note that Gierke's views on this subject were not followed in Nazi Germany during the preparation of a draft of a new law on liability for tortious injury. The draft of the Academy for German Law and the report (chief reporter, Professor Nippersky) is strikingly similar to the present soviet law on damages. Liability is based either on fault (*Verschuldenhaftung*) or on increased hazard (*Gefährdungshaftung*). See Grundfragen der Reform des Schadenersatzrechts (1940) (Arbeitsberichte der Akademie für deutsches Recht. No. 14) 11, 90.

ments against the doctrine of fault and arrive at the conclusion that none of these "can lead to repudiation of the fault doctrine as the general principle of construction of civil liability." [28] As regards the soviet law, the textbooks offer an interpretation of Section 403 previously put forward by the advocates of this doctrine, as follows:

> Some authors think that Section 403, by failing to mention the fault of the person causing the injury, did accept thereby the doctrine of causation. However, the wording of the section speaks against this point of view. Section 403 absolves the person causing injury, if he proves that he could not prevent the injury. But if he could prevent the injury and did not do so, it means that he either caused the danger on purpose (intentionally) or did not display sufficient care to avert it (negligence), in other words, that he was at fault.[29]

The soviet clause, as interpreted in this work, does not differ from the concept of modern nonsoviet jurists. For instance, Savatier, the author of a recent comprehensive French monograph, says that "Fault is nonexecution of a duty which the perpetrator should have known and observed." [30] The soviet textbooks point out, however, the "particular characteristic of the editing of Section 403, in which the principle of fault is formulated not positively but negatively." [31] The author means to say that Section 403, instead of stating that one is liable if he is at fault, says that he is liable if he does not prove that he was not at fault. Thus, remarks the textbook:

> Section 403 distributes the burden of proof in a way different from the general rule of the capitalist legislations. These legislations tend to impose the burden of proof of fault upon

[28] *Id.* 393–394; 1 Civil Law (1944) 324.
[29] *Id.* 394; 1 Civil Law (1944) 325. *Cf.* Varshavsky, *op. cit.*, note 18, 73.
[30] Savatier, 1 Traité de responsabilité civile (1939) 5.
[31] 2 Civil Law Textbook (1938) 394.

the person injured (in contrast to the liability for breach of a contract). The person injured must prove the fault of one who caused the injury. On the contrary, under Section 403, one who caused the injury, if he desires to be free from liability, must prove that he was not at fault—that he could not prevent the injury. However, because the soviet civil procedure liberally admits the initiative of the court in collecting evidence, the imposition of the burden of proof upon the one who caused the injury does not handicap him seriously. If necessity arises, the court will come to his aid.[32]

A more striking return to the traditional conception of liability for tort is to be found in a more recent manual for soviet judges (1939), issued by the Federal Law Institute attached to the Commissariat for Justice:

> Violation of the socialist legal order, being violation of law, entails the responsibility of the one who committed it. However, a violation of law is not followed in all instances by a criminal or administrative penalty. An act committed and not subjected to prosecution in a criminal or administrative proceeding may nevertheless be unlawful, i.e., may violate the law. Where restoration of the former situation or compensation for the harm caused is sufficient to restore the violated right, we speak of a civil wrong which imposes civil liability. . . . One may be held liable only under certain conditions for injury caused, viz., if the injury was caused unlawfully and if the causal connection between the unlawful conduct and the injury is established, as well as the fault of the person causing injury, and absence of fault on the part of the person injured.[33]

A soviet professor, Agarkov, considering in 1945 the problem of liability for breach of contract and tortious injury, summarized the evolution of soviet legal thought in this respect as follows:

> All those who are interested in problems of soviet private law remember how long the view prevailed that liability provided for in the Civil Code is so-called objective liability, i.e.,

[32] *Id.*, also 1 Civil Law (1944) 325, 326.
[33] Iaichkov, Obligations Arising From Causing Injury (in Russian 1939) 3, 5.

it does not presume a fault and arises from bare causation. This theory has served to explain contractual as well as tortious liability. With respect to tortious liability, the theory has been objected to by certain of our legal writers and during the past few years has altogether lost ground. At present the opinion that liability under Section 403 of the Civil Code is based upon fault is predominant.[34]

This opinion is fully supported by the general instructive ruling issued by the Plenary Session of the U.S.S.R. Supreme Court on June 10, 1943, touching upon many problems involved in liability for tortious injury. Although the ruling does not state directly the doctrine of fault, that doctrine is implied in the instruction given to the courts to distribute the damages in cases of contributory negligence (see p. 518) between the parties "in proportion to the degree of fault of each party."[35] As the textbook of 1945 states, "The mere fact of causing injury is insufficient to incur liability for damages. Liability for damage is conditioned upon the fault of him who caused it."[36]

III. Liability for Increased Hazard

1. General Characteristics

The R.S.F.S.R. Supreme Court has explained the difference between the ordinary liability for an injurious act (Section 403) and liability for extra hazard (Section 404) as follows:

The literal sense of Sections 403 and 404 shows that each of these contemplated entirely different instances of liability for injury, to wit: Section 403 deals with the liability of one who caused the injury, while Section 404 treats of the liability

[34] Agarkov, "Contribution to the Problem of Contractual Liability" 1 Problems of Soviet Civil Law (in Russian 1945) 120.
[35] See quotation from the ruling *infra*, Chapter 15, I, note 7.
[36] Zimeleva, Civil Law (1945) 251.

of a person, or an enterprise, possessing a source of *increased danger,* for an injury not caused by the conduct of a person but by this *source of increased hazard.*[37]

However, in 1943, the U.S.S.R. Supreme Court complained that:

> The courts do not always realize that Sections 403 and 404 of the Civil Code contemplate entirely different instances of liability for injury. Quite often simultaneous references to both these sections appear in the court decisions, or a reference to Section 403 appears instead of one to Section 404, and vice versa.

The difference between these two types of liability was defined somewhat more broadly in the same ruling as follows:

> 2. If an injury which arose outside contractual relations was caused by the activities of a person or enterprise connected with the use of a source of increased hazard for bystanders, the liability of the person responsible for the injury to the injured person must be determined under Section 404 of the Civil Code.
>
> In all other cases, liability for injury must be determined by Section 403 of the Civil Code.[38]

Thus, it is primarily the owner of the source of the increased danger (a thing or equipment) who is liable under Section 404. However, the courts have held that persons not employees, who by contract with the owner use such "source" in their activities, e.g., one who hired the object, are liable jointly and severally with the owner.[39]

The enumeration of enterprises given in Section 404 as being under the stricter liability provided by this sec-

[37] R.S.F.S.R. Supreme Court, Plenary Session, Protocol No. 9 of May 21, 1928, Collection of Rulings of the R.S.F.S.R. Supreme Court (Russian 3d ed.) 99, 100.

[38] U.S.S.R. Supreme Court, Plenary Session, Ruling of June 10, 1943, Civil Code (1943) 237, 239.

[39] R.S.F.S.R. Supreme Court, Protocol No. 7 of May 18, 1925; *id.* Protocol No. 7 of April 19, 1926, *op. cit.*, note 37, 105, 106.

tion is not exclusive. The courts have extended such liability to the proprietors of automobiles, of seagoing vessels and river crafts propelled by motors, of gas plants in cases of gas poisoning, of loading equipment, mines, shooting ranges, and other hazardous enterprises.[40] However, the injury must be caused directly by the source of the increased danger to establish liability under Section 404. If the damage arises for some other reason, though connected with the exercise of the trade or enterprise, the liability comes under Section 403. Thus, the R.S.F.S.R. Supreme Court held that a railroad is not liable under Section 404 for injury sustained by a treasurer who was the victim of a holdup on the train, because such injury was not caused by the increased hazard incidental to railways as a special kind of transportation using mechanical driving force.[41] The timber industry was held not an activity necessarily connected with sources of increased hazard; for this reason, an injury to a horsedriver, sustained in the transportation of timber while working on a governmental project was not subject to Section 404.[42] A fire caused by sparks from a locomotive, in the view of the R.S.F.S.R. Supreme Court, was not caused by the extra hazard incidental to railway traffic, because "as applied to a railway, the source of increased hazard means railway as a means of transportation and a mechanical driving force (e.g., the danger of explosion, et cetera) and does not cover the method of heating the locomotive, and does not represent any increased hazard."[43] The soviet textbook of 1938 correctly remarks that in

[40] 2 Civil Law Textbook (1938) 400, 401.
[41] R.S.F.S.R. Supreme Court, Protocol No. 2 of January 16, 1928, *op. cit.*, note 37, 101.
[42] *Id.*, Protocol No. 6 of March 21, 1927, *op. cit.*, note 37, 100.
[43] *Id.*, decision cited *supra*, note 37.

such case the extra hazard should be admitted.[44] Stuchka, Chief Justice at the time, explained in 1930 that the soviet Supreme Court wanted to reverse the imperial courts which had held the railways liable in such cases. The reason, according to Stuchka, was that under the soviet regime railroads are governmental, and the treasury provides for needy people in other ways.[45]

2. Acts of God as Defense

In any event, the defenses in cases of increased hazard (Section 404) are more restricted than in cases of injuries due to ordinary causes (Section 403). In both instances, the defendant is absolved if he proves that the injury was caused through the intent or gross negligence of the person injured. But if it is not a case of liability for extra hazard, the defendant is absolved by proof that he could not prevent the injury, i.e., he is not liable for fortuitous events. On the other hand, the holder of a source of increased hazard has to prove *force majeure* to establish a defense and is liable for mere accident. Neither the Code nor the court decisions offer a definition of *force majeure*. The R.S.F.S.R. Supreme Court has stated:

> The notion of insuperable force [*vis major, force majeure*] is relative. An obstacle preventing the performance of a contractual obligation becomes *vis major* not by reason of its distinctive qualities but through the interrelationship of a number of conditions and concrete circumstances. What in one place is easily surmountable may be in another place insurmountable.[46]

This statement, though made with reference to Section

[44] 2 Civil Law Textbook (1938) 403.
[45] Stuchka, 3 Course (1931) 169 *et seq.*
[46] R.S.F.S.R. Supreme Court, Civil Division, Report for 1925, *op. cit.*, note 37, 71.

118 of the Civil Code, which relates to obligations generally, is applicable, according to the soviet textbook of 1938, also to cases under Section 404.[47]

The textbook of 1944 considers this definition somewhat hazy and defines the irresistible force (*force majeure*) as "a fortuitous event specifically characterized as one which could not be prevented by any means." According to the textbook:

> The owner of the source of extra hazard is liable for damage if the event that caused it is such as may be prevented, even if in a given case he may not be held guilty of not taking measures of precaution. In establishing the impossibility to prevent the occurrence of the event, the court should take into consideration the contemporary condition of technological and economic progress. An event which could not be prevented in the light of such background is the irresistible force. But an event which could be prevented in general, although it could not be prevented by a given defendant, is not an irresistible force. For instance, fire caused by a spark from a locomotive is not an irresistible force because it may be prevented, although a given railroad may not have been able to do this at a given moment. It is characteristic of the irresistible force that it cannot be prevented by a given person but by a given society in general.[48]

3. Liability of Airlines

Special rules have been enacted, defining the responsibility of civilian airlines. Section 78 of the U.S.S.R. Air Code absolves the airlines only when the injury was caused by the "intent or gross negligence of the person injured" and, in contrast to Section 404, imposes the hazard of *vis major* upon the airline. The section reads:

> An institution, enterprise, organization, or person exploiting a civil aircraft, shall be liable, under the laws of the Soviet Union and soviet republics to repair damages caused by death or bodily injuries to passengers at the start, flight, and landing,

[47] 2 Civil Law Textbook (1938) 405.
[48] 1 Civil Law (1944) 340.

as well as damages caused by injuries to property or persons not carried by aircraft, unless it be proved that the injury occurred in consequence of intent or gross negligence of the person injured.[49]

4. The Justification of the Doctrine of Increased Hazard

The soviet textbooks of 1938 and 1944 enter into a discussion of the theories of objective liability set forth in the preceding pages. The discussion is again obviously inspired by the work of I. A. Pokrovsky, the Russian prerevolutionary writer already mentioned.[50]

The theory attempting to justify liability for extra hazard by the old principle of Roman law *cujus commodum ejus periculum* (as the textbook translates it, "whoever derives profit from a particular activity must bear its disadvantages") is discarded: "This is the capitalist point of view. One cannot see the realization of this principle in Section 404 of the Civil Code."[51] Any keeper of wild animals and, consequently, a zoo organized to serve the public interest without profit, as well as many unprofitable public services and utilities, do nevertheless come under liability for extra hazard.

Likewise, the theory that by means of liability for hazard losses are equally distribtued among all those who derive benefit from a given activity connected with such hazard, is regarded as untenable. Advocates of this theory suppose that imposition of liability for fortuitous events upon the enterprise induces it to add the expenses thereby caused to the price taken from all customers. Thus, damage fortuitously caused is borne as a species of insurance by all those who use the services

[49] Section 78, U.S.S.R. Air Code, U.S.S.R. Laws 1935, text 359.
[50] Pokrovsky, Basic Problems of Civil Law (in Russian 1917).
[51] 2 Civil Law Textbook (1938) 401; 1 Civil Law (1944) 336.

of the enterprise. This theory cannot be upheld, because owners of cars privately used are liable under Section 404 and damages paid by them are not distributed. Moreover, there is a substantial difference between the insurance principle and liability for injury caused. The former distributes damages, but the latter imposes them upon a person or enterprise.

The textbooks conclude that there are in fact several reasons for the special liability established by Section 404. In some instances, the activity is so dangerous as to be considered, as it were, a fault in itself, e.g., possession of explosives. In other instances, the law seeks to stimulate the development of safety measures. Finally, enterprises engaged in dangerous activities, if responsible merely for fault, would frequently escape liability by pleading circumstances excluding their fault, which neither the plaintiff nor the court would be able to verify or to refute.[52]

It may be stated that the provisions of Section 404 deserve full credit as an interesting and sound attempt to apply in the field of liability for tortious injury the advanced doctrines of European jurisprudence.

IV. Liability for Tortious Injury and Breach of Contract

1. Confusion in the Judicial Practice

The soviet Civil Code contains two sets of rules dealing with damages, viz., Sections 403–415, obviously designed for torts, and Sections 117 and following, regulating damages caused by nonperformance of an obligation. Nevertheless, until recently, neither were the soviet writers unanimous concerning the sphere in

[52] 2 *id.* 401–402; 1 *id.* 337.

which each set of rules must apply, nor were the soviet courts consistent. Some of the writers and court decisions regarded Sections 403–415 as applicable only in cases where damage arose outside contractual relations; others failed to draw this distinction.[53] The U.S.S.R. Supreme Court pointed out on June 10, 1943, the following errors in the application of Sections 403–415:

> Examination of the court decisions in cases involving reparation for injury under Sections 403–415 of the Civil Code . . . shows that, although the provisions of these sections contemplate reparation for injury caused outside contractual relations, nevertheless under these sections the courts have sometimes decided disputes concerning damages caused by employees in the discharge of their duties to employers (which come under Sections 83–83 [3] of the Labor Code), as well as disputes over damages caused by nonperformance of an obligation (Section 117 of the Civil Code). In some instances, under Section 403 of the Civil Code, the courts have adjudicated claims against railways for damages for lost consignments.[54]

Moreover, in instances of conflict, viz., where the facts would allow a choice between an action based on tort or an action for damages caused by breach of contract, the courts in the 1920's did not take any definite stand, in spite of the fact that among legal writers the opinion prevailed that, where damages may be claimed under a

[53] R.S.F.S.R. Supreme Court, Plenary Session, Ruling of June 28, 1926 (quoted *infra,* Chapter 15 at note 9); Ukrainian Supreme Court, Civil Division, Decision of March 14, 1924 (1924) Collection of Decisions of the Ukrainian Supreme Court (in Russian) No. 34, and Decision of May 16, 1928 (1928) Messenger of Soviet Justice No. 14, 508. Varshavsky, *op. cit.*, note 18, 52, gives less consistent decisions by the arbitration tribunals and differing opinions of soviet authors. An interesting dissertation on the perplexity of this problem in comparative law has appeared in Switzerland by Tahir Caga Konkurrenz deliktischer und vertraglicher Ersatzansprüche nach deutschem und schweizerischem Recht mit Rücksicht auf gemeines Recht (Aargau 1939).

[54] U.S.S.R. Supreme Court, Plenary Session, Ruling of June 10, 1943, Preamble, Civil Code (1943) 236.

contract (Section 117), a claim based on tort (Sections 403–415) is excluded.[55]

The U.S.S.R. Supreme Court has even shown a tendency recently to apply the rules of damages for tortious injury (Section 403) in the presence of contractual relations between the parties antecedent to the act causing injury. As was pointed out by Professor Agarkov in 1945, the courts have failed in such instances to state the reason for their choice.[56] Thus, the Supreme Court instructed a lower court to apply Section 403 in a case where a collective farm claimed damages from farmers who failed to attend properly to a bull which they obtained from the farm under a contract of gratuitous use.[57] The same section was referred to in a case where damage was caused by a pharmacy which failed to label medicine with proper instructions; the court failed to consider the question whether the pharmacy thereby violated the duty of a vendor of medicine.[58] In another case, the Supreme Court again referred to the rules of torts, although the question involved was that of the liability of the State Bank for money deposited.[59]

2. Recent Trends

It seems, however, that at present the Ruling of the Plenary Session of the U.S.S.R. Supreme Court of

[55] Agarkov, *op. cit.*, note 34, 150; Tadevosian and Sverdlov, The R.S.F.S.R. Civil Code as Applied by the Courts (in Russian 1929) 157; Goikhbarg, Economic Law (Russian 3d ed. 1924) 172, note 2; Varshavsky, Obligations Arising from Causing Injury 56–57.

[56] Agarkov, *op. cit.*, note 34, 151.

[57] Ksyl—Pakhtur Collective Farm v. Nuradovs, U.S.S.R. Supreme Court, Civil Trial Division, Decision No. 76 of 1940, Collection of Decisions of the Trial Division of the U.S.S.R. Supreme Court for 1940 and 1941 (in Russian 1942) 226.

[58] Isakhadze v. Pharmacy of the City of Gerjal, U.S.S.R. Supreme Court, Civil Trial Division, Decision No. 1181 of 1940, *op. cit.* 225.

[59] The case is abstracted *infra*, Chapter 15 at note 12.

June 10, 1943, has expressly overruled such practices and definitely established the principle that in case of conflict the rules covering liability under a contract (Section 117 *et seq.*) prevail. The ruling emphasizes that the rules for damages for tortious injury (Sections 403–415 of the Civil Code) may apply only "where reparation for such injury as arose outside contractual relations is claimed." The Supreme Court stated:

1. The provisions of Sections 403–415 of the Civil Code shall be applied by the courts only in cases where reparation of such injury as arose outside contractual relations is claimed. If the injury suffered by the plaintiff arose from nonperformance of an obligation undertaken by the defendant under a contract or imposed upon him by operation of law, liability for the injury shall be determined either in accordance with the terms of the contract made by the parties (Sections 117–122 of the Civil Code) or under the provisions of law regulating the legal relationship of the parties.

2. If an injury which arose outside contractual relations was caused by the activities of a person or enterprise connected with the use of a source of increased hazard for bystanders, the liability of the person causing the injury to the person injured shall be determined under Section 404 of the Civil Code.

In all other cases, liability for injury shall be determined pursuant to Section 403 of the Civil Code.[60]

3. Liability Under Contract and for Tort Compared

A most detailed comparison of the soviet provisions governing liability under a contract and for tort has been offered recently by the late Professor Agarkov.[61] He points out that both liabilities have many things in common. In the first place, a tort and a breach of contract are each a kind of wrongful act. Thus, the tortfeasor is absolved if he proves that he was privileged to

[60] U.S.S.R. Supreme Court, Plenary Session, Resolution of June 10, 1943, Civil Code (1943) 238.

[61] *Op. cit.*, note 34, 144–154.

cause the damage. Likewise, the debtor is liable for damages if he fails to perform the obligation. That is his duty, and failure to comply with it may be regarded as a wrongful act. Secondly, the liability of the tortfeasor under Section 403 or of the debtor under Section 118 of the Civil Code:

> Arises provided the tortfeasor or the debtor could have prevented the damage and failed to do so. Consequently, in both instances, liability arises in the presence of fault (intent or negligence). Likewise, in both cases the duty to prove the fault lies with the defendant and not with the plaintiff. The plaintiff does not have to prove the fault of the defendant. The fault of the defendant is presumed. It is the defendant who must prove that he is not at fault if he does not wish to be held liable.

Professor Agarkov states further that "liability under Section 403 requires a causal connection between the illicit act and the injury. Under this section, the person *causing the injury* is liable. Similar causal connection is required for liability under a contract. The debtor is liable to compensate the creditor for damage *caused* by nonperformance (Section 117)." Finally, both kinds of liability consist in the last analysis in the payment of compensation in money.

In contrast to these similarities, the same author stresses the following differences between the two kinds of liability:

> Contractual liability presumes the existence of relations between the parties based upon an obligation antecedent to the liability. Sections 117–119 and 121 of the Civil Code regulate the liability of debtor to creditor. Here liability for breach of contract signifies a change in the contents of an existing obligation . . . but other elements of the obligation remain unchanged. . . . But liability under Sections 403–415 does not presume the existence of a relationship between the parties antecedent to liability and based upon obligation.

[Soviet Law]

Under these sections, it is not the debtor who is liable to his creditor by virtue of an obligation which arose previously, but the tortfeasor (or person responsible for him) who is liable to the person injured, not for nonperformance of an obligation but for injury caused irrespective of any contractual relations whatsoever.[62]

Professor Agarkov refers also to the fact that among the writers on private law, including some Anglo-Americans,[63] the opinion has been put forward that, in the case of a breach of contract, a new obligation to compensate for damages arises instead of the original obligation. He disagrees with this opinion:

> If the new obligation is considered independent of the original, this view is simply wrong. The duty to compensate for damage caused by nonperformance of an obligation (based on a contract or on other grounds) is in all respects, except for the change in the content of the obligation, identical with the original. Its existence depends upon the same prerequisites; against the claim of the creditor the same defenses may be used. But usually the advocates of this point of view do not insist upon the independence of the new obligation. Then this view, without changing the essence of the matter, complicates the presentation of the problem.[64]

Professor Agarkov also stresses the point that the tortfeasor is absolved if he proves "the intent or gross negligence" of the person injured, while the debtor is relieved from his liability for nonperformance if he proves that the impossibility of performance came about "through the intentional design or negligence of the creditor" (Section 118). Thus, in the latter case, any kind of negligence, even slight and not necessarily gross negligence of the creditor, relieves the debtor. In this

[62] *Id.* 145.

[63] Anglo-American: Anson-Corbin, Principles of the Law of Contract (1930) 12; French: Mazeaud, 2 Traité de la responsabilité civile (2d ed. 1934) No. 100.

[64] *Op. cit.*, note 34, 146.

respect, the soviet law is different from the German and Swiss laws, which absolve the tortfeasor equally with the debtor in case of any negligence on the part of the person injured or the creditor.[65] In view of the difficulty of drawing a distinction between degrees of negligence under the soviet law, the present writer, contrary to Professor Agarkov, fails to see any advantage in this rule.

Parents, guardians, et cetera, share the liability of children over fourteen years of age, wards, et cetera, for torts but not for nonperformance of an obligation (Section 405). Professor Agarkov also points out the following difference:

> By virtue of Section 406, the court may, in view of the property status of the tortfeasor, hold him liable for damages, even if he is not obliged to do so under Sections 403–405. . . . The provisions of Section 406 shall not apply to the liability arising from an obligation (Section 117). If by virtue of Section 118 the debtor is not liable for nonperformance, the court may not hold him liable for damages, even if his property status is much higher than that of the creditor. . . . Likewise Section 411, under which the court must take into account the material standing of the parties in determining the amount of damages, shall not apply to liability under a contract. . . . Economic status may be taken into account only in defining the method of execution. The debtor may be granted deferment or allowed to pay by installment (Section 213).[66]

Furthermore, in instances of damages for nonperformance of an obligation, several debtors are held liable jointly and severally only where they are jointly and severally liable for performance of the obligation (Sections 115, 116 of the Civil Code). In instances of tortious injury, several persons are held jointly and sev-

[65] German Civil Code, Art. 254; Swiss Code of Obligations, Arts. 44 and 99.

[66] *Op. cit.*, note 34, 147.

erally liable if under Section 408 they have "jointly" caused the injury.

"Jointly" (Professor Agarkov comments) means that it is impossible to conceive one portion of injury as inflicted by the acts of one tortfeasor and another portion thereof inflicted by another tortfeasor. Under Section 405 parents, guardians, et cetera, are liable jointly and severally together with their minor children over fourteen years of age and wards, for injuries caused by the latter.[67]

Especially essential is the difference with regard to liability for the fault of another. According to Section 119 of the Civil Code, the debtor is liable for the fault, intentional design, or negligence, of the person "charged by operation of law or by orders of the debtor with performance of the operation." No such general rule is established by the statute regarding liability for tortious injury. Only certain specific instances are provided for in Sections 405 and 413, paragraphs 2 and 4 (see *infra*, Chapter 15).

[67] *Ibid.*

Chapter 15

Torts: Joint Liability; Damages

I. Contributory Negligence

1. Theory of Mixed Fault

At first glance, the provisions of Sections 403 and 404 may suggest that contributory negligence on the part of the person injured absolves the one who caused the injury from all liability for damages. This seems to follow, as was pointed out recently by a soviet writer,[1] from the clause that one who caused the injury is absolved "if he proves that the injury arose as a result of the intent or gross negligence of the person injured," as stated in Section 403 and in the similar clause in Section 404. The logical conclusion would be that, as soon as gross negligence of the plaintiff is proved, his claim in tort must be denied.

However, the soviet courts have given a different interpretation, more in line with the Western European doctrine in cases of contributory negligence, viz., the doctrine of mixed liability of both parties and commensurate distribution of damage among them.[2] It is interesting to note that the imperial Russian courts faced a similar problem and arrived at the same solution. Like the soviet Code, the imperial statute did not contain any

[1] Agarkov, "The Fault of the Person Injured" (in Russian 1940) Soviet State No. 3, 70.

[2] German Civil Code, Art. 254; Swiss Code of Obligations, Art. 51; Austrian Code, Art. 304.

provisions dealing directly with contributory negligence. However, the imperial Supreme Court ruled that, if, in addition to the defendant's fault, the plaintiff's fault also contributed to the cause of injury, then the case is one of "mixed fault" and the liability must be distributed either equally among the parties[3] or in different proportions, as stated in later decisions, "depending upon the circumstances of the case and the degree of fault of each party."[4] In accordance with these precedents, the compilers of the draft of a new imperial civil code in 1913 included this principle in the text of the draft.[5] The compilers of the soviet Code, who in many instances used the imperial draft, did not write this principle into their Code. However, the principle was introduced by the decisions of the soviet courts. In 1926 the R.S.F.S.R. Supreme Court held:

> The principle of mixed liability is not mentioned in our statute. Sections 403 and 404 of the Civil Code either impose upon the person who caused injury the duty to repair the injury or, under certain conditions, absolve him from liability. However, life itself presents more complex conditions under which injury occurs than those contemplated by the law. In many cases it would be unjust to impose upon the person causing the injury full liability therefor; and in other cases it would be no less erroneous to free him of all responsibility. Special difficulties in the practice of the courts have been presented by cases where, side by side with established gross negligence on the part of the injured person, there was no less reprehensible gross negligence, carelessness, et cetera, on the part of the wrongdoer. . . . In such cases, the Civil Division of the R.S.F.S.R. Supreme Court found it necessary to apply the doctrine of mixed liability.
>
> This is the essence of the doctrine. Where the injury is the

[3] Ruling Senate, Civil Division, Decisions 1905, No. 31, and 1907, No. 21. See also Iablochkov, 2 Influence of the Fault of the Injured Person upon the Amount of Compensation (in Russian 1910) 359 *et seq.*

[4] *Id.*, Decision 1908, No. 18.

[5] Section 2613 of the final draft.

result of improper, careless, or negligent acts both of the person causing the injury and of the person injured, liability for such injury must be shared, i.e., it can be imposed equally or in some other manner upon the person causing the injury and the person injured. If, for instance, the court is convinced that the case involves mixed liability, it may, as a general rule, award to the injured person one-half or some other portion of the damages to which he would normally be entitled.[6]

In this decision, stress is laid upon the mutual fault of both parties as a ground for sharing liability.

In 1943, the U.S.S.R. Supreme Court sustained the same construction of mixed liability and ruled in a general way that, in cases of mixed liability, compensation must be distributed among the parties "in proportion to the degree of fault of each party." The Supreme Court stated:

> Where, according to the facts established in a case, the injury occurred not only as a result of improper action of the person causing the injury, but also in consequence of gross negligence or gross carelessness of the injured person himself, the court may, applying the principle of "mixed liability," impose upon the person causing the injury the duty of partial compensation for the injury in proportion to the degree of fault of each party.[7]

2. Joint Causation

However, other earlier decisions have emphasized another element of the doctrine, viz., the contribution by the injured party to the cause of injury whether by his fault or not. The Ukrainian Supreme Court has stated:

> Although the principle of distribution of liability [between the injured and the one who caused injury] is not expressly

[6] "Report on the Activities of the Civil Division of the R.S.F.S.R. Supreme Court for 1926," Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 1925) 77; Civil Code (1943) 218.

[7] U.S.S.R. Supreme Court, Plenary Session, Ruling of June 10, 1943, Section 12, Civil Code (1943) 242.

stated in the Civil Code, nevertheless, it should apply in cases where it is impossible to establish the fact that the injury was caused solely by acts of one party and where for reasons of social policy it is impossible to impose the entire damage either upon the injured alone or only upon the party causing injury.[8]

This view was shared by the R.S.F.S.R. Supreme Court:

> Section 403 and the subsequent sections of the Civil Code, which constitute the concluding chapter of the law of obligations, are merely a supplement to contractual obligations and apply only in cases where the injury arose outside contractual relations. Section 403 is by no means peculiar to soviet law, as the courts have often indicated in their decisions, but has been borrowed from the civil law of capitalist codes (e.g., the French Code). Therefore, in a certain measure, Section 403 has an exclusive character and is subject to strict, not extensive, application and interpretation; in the instant case, the Civil Division of the R.S.F.S.R. Supreme Court affirmed the decision of the Court, which found it sufficient that "the conduct of the defendant was one of the causes of the injury sustained, even though it was not in itself sufficient to have given rise to this damage." This thought directly contradicts Section 403 of the Civil Code which requires that the acts of the defendant have entirely caused the damage, that is, his acts have been the sole cause of the given damage, and that, consequently, he is liable to the extent of the damage caused. In cases where there is an interplay of several or many causes, the Court must evaluate the significance and specific weight of each cause of the given damage, and take into consideration also the part played by the injured person himself in causing damage (so-called mixed liability because of contributory negligence).[9]

The recent soviet textbooks comment that the wording of the decision is not precise enough, as there is never a single or sole cause of an event:

> Evidently the R.S.F.S.R. Supreme Court meant to say that

[8] Ukrainian Supreme Court, Decision of May 16, 1927, (in Russian 1927) Messenger of Soviet Justice No. 14.

[9] R.S.F.S.R. Supreme Court, Plenary Session of June 28, 1926, Protocol No. 10, Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 1935) 77; Civil Code (1943) 217.

the causal connection between the conduct of the defendant and the injury must be *typical*, that his act, judged from the point of view of normal life experience, *usually* produces a given result.[10]

Thus, if the conduct of the person injured may be viewed as the usual cause of injury and shows gross negligence, the defendant must be absolved *in toto*. Mixed liability arises only in cases where the conduct of both parties appears as a combined cause of injury and where both parties are at fault.

3. Cases

The following decisions of the U.S.S.R. Supreme Court illustrate how the doctrine of mixed fault has been applied:

In May, 1933, the plaintiff jumped off a train in motion at a station, fell under the wheels, and lost an arm. It was established that he overslept, passed the station at which he was to leave the train, and jumped off because he did not want to travel to the next station. The U.S.S.R. Supreme Court held:

The act of a passenger in jumping off the train while in motion appears in all cases gross negligence, because such conduct is inevitably connected with the possibility of an accident. Only in exceptional cases may such acts of the person injured be justified, if, for instance, the passenger jumped off for his own safety in case of fire, train wreck, et cetera.[11]

A government corporation deposited with a local branch of the State Bank a sum of money which was embezzled by the cashier of the branch. It was established that, in violation of the rules of the Bank, the deposit receipt was signed by the cashier alone without a countersignature by the controller. The court of first instance held for the plaintiff. The U.S.S.R. Supreme Court held that the rules of the Bank are equally mandatory not only for employees of the Bank but for customers as well, that the plaintiff could not plead ignorance of the rules because they were printed on the deposit receipt, and that

[10] 2 Civil Law Textbook (1938) 397; 1 Civil Law (1944) 328.
[11] Agarkov, *op. cit.*, note 1, 72.

thereby gross negligence of the person injured was proved. The lower court was instructed to apply the principle of mixed liability.[12]

An electrician had to install electric lights on the square of the city of Tbilissi for night work thereon. In order to connect the wire, he climbed on the roof of a house without asking permission of the manager of the house, choosing a dangerous way, although there was another safe way to get on the roof. He fell and suffered injury. The U.S.S.R. Supreme Court held it to be evident from the records of the case that the plaintiff was wrong in failing to ask permission from the management of the house, in consequence whereof, and being unfamiliar with the location of the safe passageway, he selected a dangerous one.[13]

A worker in a governmental railway repair shop used an imperfect axe, which broke and caused him injury. The court held that the act of the worker was grossly negligent, because it was established that the regulations issued for the shop prohibited the use of imperfect instruments. The liability was divided.[14]

"An employee of the defendant shipping enterprise was negligent in his inspection of a barge, as a result of which it sank, destroying freight belonging to the Oil Syndicate. At the same time, there was 'failure by the plaintiff's agents present at the loading to exercise due circumspection,' in violation of its agreement with the defendant to notify the latter immediately upon the discovery of any defects in the ships. The court decided 'to apportion the damages equally between the Oil Syndicate and the defendant, and award the former one-half the damages claimed.' " [15]

"*P*, the owner of a building, leased part of it to *G* for dwelling purposes and part to *S* for use as a store. *P* also resided in the building. The several premises were separated by wooden partitions. A fire originating in *G's* premises, after he had heated the stove and left it unattended, destroyed the building. *P* sued *G* for 2,500 rubles and recovered judgment."

[12] (1939) Soviet Justice No. 12, 69.
[13] *Id.*, No. 15/16, 71–72.
[14] Agarkov, *op. cit.*, note 1, 74.
[15] Supreme Arbitral Board Attached to the Council of Labor and Defense, Decision of September 26, 1924. This abstract and translation are quoted by courtesy of the authors from Holman and Spinner, "Basis of Liability for Tortious Injury in Soviet Law" (1936) 22 Iowa L. Rev. 10.

On appeal, the R.S.F.S.R. Supreme Court held: "The court must determine not only who is at fault, but also the extent to which each party is responsible for the spread of the fire. In the entire building, despite its high income value, there was not a single main wall which could have prevented the fire from spreading over the entire structure. The doctrine of mixed liability should be applied and the plaintiff charged with 50 per cent of the damages awarded.

"An employee, temporarily acting as a cashier, was held civilly liable for the loss of 1,100 rubles stolen out of his brief case. He defended himself on the grounds of his inexperience as a cashier, and the failure of the plaintiff to supply him with a cage, whereby he had to perform his duties at a place easily accessible to other employees, and even to the general public." The R.S.F.S.R. Supreme Court, while approving the imposition of liability upon him, reversed and remanded the case on the ground that the plaintiff had not "taken all measures of precaution for the safety of the money," and that, therefore, the lower court should consider the imposition of mixed liability, and if such be established, compel both parties to bear the financial loss proportionally.

"Where an employee of a Trust [government-owned quasi corporation], having in his possession a checkbook belonging to the trust, forged a check and absconded with the money," the Plenary Session of the R.S.F.S.R. Supreme Court reversed a judgment against the State Bank for the "'fault of its employees in exhibiting exceptional inattention and carelessness in honoring a forged check,' it held that the owner of the checkbook is responsible for careless custody thereof, that the forgery occurred because of such carelessness, but that the money was paid out through the inexcusable negligence of the defendant's employees, and that, 'where the causing of the injury occurred through the carelessness of both parties, liability for the loss must be borne by both, and the extent of the liability of each is to be determined in accordance with the facts of the case.'" [16]

It may be noted that in cases abstracted in two preceding paragraphs, there was a contractual relation be-

[16] (1929) Judicial Practice (in Russian) No. 3, 3; (1927) *id.* No. 12, 9; (1928) *id.* No. 8, 3. Abstracted and translated by Holman and Spinner, *op. cit.*

tween the parties, for which reason the application of rules of torts is rather inappropriate.

It may also be mentioned that a defendant who is absolvable because of the fault of the plaintiff, which was the only cause of injury, may nevertheless be held liable under Section 406 in view of the property status of the parties (see *infra*).

II. Liability for Damages and the Economic Status of the Parties

1. Statutory Provisions

Two sections among the provisions of the soviet Code dealing with torts have no precedent in nonsoviet codes. Their provisions and application are of special interest because their framers were inspired by the aim to find a new path for social justice, and offered the court the possibility to make the wealthy pay where the poor are absolved. These provisions are as follows:

406. In situations where, in accordance with Sections 403–405, the person causing the injury is not under a legal duty to repair, the court may nevertheless compel him to repair the injury, depending upon his property status and that of the person injured.

411. In determining the amount of compensation to be awarded for an injury, the court in all instances must take into consideration the property status of the party injured and that of the party causing the injury.

2. Historical Note

The provisions of Sections 406 and 411 have an appearance of distinct novelty. However, provisions of Section 406 are no more than an attempt to write into the statute book a doctrine of "liability because of equity" (*Haftung aus Billigkeit*) which has been espe-

cially developed in German legal literature. As a matter of fact, the wording of Section 406 was borrowed, as correctly observed by a soviet writer,[17] from the text of Article 752 (now 829) of the draft of the German Civil Code of 1900.[18] This part of the article was dropped from the final draft, and Article 829 now provides for compensation from the property of a minor, if his parents or guardian are not to blame but the property status of the person injured dictates the equity of compensation for damage caused by the minor. A draft prepared under the Nazi regime (1940) by the Academy of German Law has also proposed to enact the rule dropped from the German Code of 1900.[19]

Regarding Section 411, it may be noted that under the civil codes in jurisdictions where the court may at its discretion determine the amount of damages (e.g., Switzerland, imperial Russia),[20] the property status of parties may be taken into account. The soviet Code is different in making this mandatory. But as is shown *infra*, the soviet courts have introduced several important limitations on the rule.

3. Application of Section 406

It seems that this section has not become popular with the soviet courts. Varshavsky, author of the best soviet monograph on tortious injury (1929), states:

[17] Varshavsky, Obligations Arising from Causing Injury (in Russian 1929) 169.

[18] 752. Whoever is not liable in cases contemplated by Articles 746–748 for the injury caused by him because there was no intention or negligence on his part, shall nevertheless be liable for damages to the extent equity requires this in view of the facts of the case, in particular, in view of the property status of the parties, provided the person causing injury is not deprived thereby of means of subsistence.

[19] Nipperdey and others, Grundfragen der Reform des Schadenersatzes (1940) 80–84, 91.

[20] Section 685, Civil Laws, Svod Zakonov, Vol. X, Part 1; Art. 43, Swiss Code of Obligations.

We know of many cases where the supreme courts refused to apply Section 406 and know of none where they would have applied it.[21]

Similar is the judgment of the textbooks of 1938 and 1944:

> Section 406 may apply only in exceptional cases where, in view of the property status of the defendant as compared with that of the plaintiff, it would appear extremely unjust to impose upon the person injured damage caused by the defendant. The court may in such cases impose upon the defendant the full damage or part of it. Section 406 cannot and could not have at present a wide application in the administration of justice . . . Cases of the application of Section 406 by the courts are rather exceptional.[22]

How impractical the novelty proved to be is evident from the cautious attitude in its application recommended by the R.S.F.S.R. Supreme Court, as follows:

> Section 406 of the Civil Code should not apply in the absence of causal connection between the damage caused and the act of the defendant; in other words, the fact of causing damage by the person involved must be present, for without this the application of Section 406 of the Civil Code has no rational sense: where the injury was not caused by the act of the defendant he cannot be sued in court.

Again, the government is exempt from the effect of this section. After some hesitation, the Supreme Court held:

> Section 406 cannot, under any circumstances, apply to defendant governmental organizations, for the State provides for security of workers through the special agencies of social insurance and cannot therefore be required to perform, through its other organizations, the same function in an unorganized manner. The application of Section 406 of the Civil Code to State organizations' defendants means an imposition of lia-

[21] Varshavsky, *op. cit.*, note 17, 170.
[22] 2 Civil Law Textbook (1938) 406; 1 Civil Law (1944) 342.

bility upon the State in any event, since the State is always economically stronger than the individual toiler.[23]

4. Application of Section 411

Similar restrictions were introduced by the court regarding the application of Section 411. In the first place, the R.S.F.S.R. Supreme Court has ruled that Section 411 shall apply only in cases where "both litigants are private persons." Where the plaintiff is a governmental or co-operative organization, a comparison of the property status of the parties is impossible, and in such cases the court must, in deciding the case, take into consideration only the status of the defendant.[24] It has also been held that Section 411 shall not apply "to persons who committed embezzlement or conversion of property entrusted to them."[25] Civil claims against officials who have committed crimes by negligence and for motives other than unlawful gain must be tried jointly with the criminal proceedings and decided under Section 44 of the Criminal Code providing for reparation of injury depending upon the status of the defendant.[26] The U.S.S.R. Supreme Court restated these exceptions in a general way in the Ruling of June 30, 1943:

> 13. The provisions in Section 411 concerning taking into consideration the property status of the party injured shall not apply to cases where a governmental, co-operative, or public institution, enterprise, or organization is the party injured.
>
> 14. Section 411 shall not be applied by the courts in cases involving pilfering, missing goods, or products, or their mismanagement, in governmental, co-operative, and public insti-

[23] R.S.F.S.R. Supreme Court, Civil Division, Report for 1926, Collection of Rulings of the R.S.F.S.R. Supreme Court (Russian 3d ed. 1932) 103; 1 Civil Law (1944) 342.

[24] *Id.*, Plenary Session, Ruling of April 2, 1928, Protocol No. 7, *op. cit.*, note 23, 107; Civil Code (1943) 223, 224.

[25] *Id.*, January 16, 1926, Protocol No. 2, *loc. cit.*

[26] *Id.*, January 8, 1930, Protocol No. 1, *op. cit.*, note 23, 108.

tutions, enterprises, and organizations. According to the Resolution of the Committee for National Defense of January 22, 1943, and its Order of May 22, 1943, the value of pilfered or missing foodstuffs in such cases shall be recovered from the guilty persons at market prices, and that of industrial goods at commercial prices, multiplied by five.[27]

In view of these exceptions, Sections 406 and 411 lose the features of a general rule and do not protect the poor.

III. Special Liabilities: Joint and Several; Liability of and for Minors

1. Joint and Several Liability for Damage Jointly Caused

On this a certain discrepancy may be noticed in the judicial interpretation of the following provision of the Civil Code:

408. Persons who jointly cause an injury shall be jointly and severally liable to the injured person.

Thus, the conference of justices in 1927 gave a rather broad construction of the term "joint causation." Mutual causal connection between the individual acts and the injury was deemed sufficient, even if these acts had no connection one with another. The conference held:

> Even if the injury is caused by independent acts of various persons but between those acts and the injury there exists mutual causal connection, in the sense that the injury is the result of the combination of the acts, or if each of these persons is individually fully responsible for the injury, they bear joint and several liability to the person injured and have mutual rights of contribution.[28]

[27] U.S.S.R. Supreme Court, Plenary Session, Ruling of June 10, 1943, Civil Code (1943).

[28] R.S.F.S.R. Supreme Court, Civil Division, Conference, Protocol No. 2, February 4, 1927 (in Russian 1927) Judicial Practice No. 7, 21. Varshavsky,

The following cases were cited in the same protocol:

(a) A merchant knowingly reselling a stolen article was held liable jointly and severally with the thief for the value of the article, even though he did not know who the thief was and did not act in privity with him.

(b) An injury occurred at a mill. Both the owners and the lessees in control of the mill at the time of the injury were sued. The Plenary Session affirmed the imposition of joint and several liability upon both defendants, ruling that for such an injury each is fully responsible.

(c) A was hired by B to operate a threshing machine rented by B from C. A was injured, and the court held B and C jointly and severally liable.

Likewise, the R.S.F.S.R. Supreme Court held the customer, his contractor, and supervisors appointed by the latter, jointly and severally liable to the worker who suffered injury caused by violation of safety rules by all these persons. Agreements among them, said the court, may serve only to define the rights of subrogation of the customer against the contractor or of the contractor against the supervisors. The customer, to protect himself against liability for the acts of his contractor has to do so at the conclusion of the contract, e.g., by demanding that he insure workers against accidents or file a bond, et cetera.[29]

Against these examples of a broader construction of joint and several liability stands a demand for a narrower construction expressed in another ruling of the same court, as follows:

Under Section 408 of the Civil Code only such persons are jointly and severally liable to the injured party as have caused damage by joint acts.

op. cit., note 17, 165 *et seq.* Translation and abstract by Holman and Spinner. *op. cit.* 28, 29 were used.

[29] *Id.*, Plenary Session, Ruling of April 19, 1927, Protocol No. 7, Collection of Rulings of the R.S.F.S.R. Supreme Court (Russian 3d ed. 1932) 105, 106; 1 Civil Law (1944) 343.

[Soviet Law]

For this reason, partners to the crime may, and must, be liable to the full extent for injury caused to the injured party only in cases where they were recognized as true partners in crime, as accomplices, instigators, et cetera.[30]

In contrast to the case quoted above under (a), in this case the R.S.F.S.R. Supreme Court held that, in case several persons were convicted each for an individually defined crime, e.g., one for larceny and another for the receiving of obviously stolen goods, even though these are the very goods which were stolen, no joint and several liability arises. It is this decision and not the others that is referred to in the textbooks of 1938 and 1944, and in the annotated edition of the Code of 1943. It seems, therefore, that the narrow construction now prevails.[31]

2. Mutual Relations of Joint Tortfeasors

The mutual relation of persons jointly and severally liable for damages is left open by the soviet Code. The textbooks of 1938 and 1944 and leading authors suggest the application of the general rule expressed in paragraph 3 of Section 115 of the Civil Code. Thus, if one of the obligors has paid the full amount of damages, he is entitled to recover an equal share from each person jointly and severally liable with him.[32]

3. Damage Caused by Minors and Insane

Minors under fourteen years, as well as weak-minded adults placed under guardianship, are not liable for damage caused by them. In such instance, the liability is upon persons "who are under the duty of supervision,"

[30] *Id.*, Ruling of July 19, 1926, Protocol No. 12, *op. cit.* 105.
[31] 2 Civil Law Textbook (1938) 406, 407; 1 Civil Law (1944) 343; Civil Code (1941) 197; *id.* (1943) 222.
[32] *Ibid.;* also Varshavsky, *op. cit.*, note 17, 169.

ordinarily parents and guardians of minors and persons taking care of weak-minded adults (e.g., directors of insane asylums).

Minors over fourteen years are fully liable for damage inflicted by them. Under the original provisions of Section 405 of the Civil Code, minors over fourteen years were alone responsible for such damage. In 1935 this section was amended and since then, together with the minors between fourteen and eighteen years of age, their parents and guardians are equally liable for damage inflicted by such minors. However, in 1943, the U.S.S.R. Supreme Court complained that the courts "sometimes adjudicate damages from parents and guardians without holding the minors liable." [33] The textbooks of 1938 and 1944, in accord with the R.S.F.S.R. Supreme Court, explain:

> Liability under Section 405 is based, like that under Section 403, upon fault; i.e., the person who is under the duty to take care of a minor or insane person is absolved from liability, if it is proved that he could not prevent the injury caused by the minor (or insane person) under his care. This is held by the soviet courts.[34]

The rule of the imperial Russian law (common to German and Swiss law) that, in case the parents or guardians are not to blame, "the damages may be paid from the property of the minor or the ward," [35] was not incorporated in the soviet Code.

4. Liability for Another

Responsibility of master for servants and of principal for his agent (responsibility for third parties) in case

[33] For the text of the ruling, see comment to Section 405 of the Civil Code, translated in Vol. II, No. 2.

[34] R.S.F.S.R. Supreme Court Ruling, Protocol No. 5 of April 6, 1925, 2 Civil Law Textbook (1938) 407; 1 Civil Law (1944) 331.

[35] Section 686, Civil Laws, Svod Zakonov, Vol. X, Part 1 (1914 ed.).

of injurious acts is left unprovided for by the soviet Civil Code. Section 405 is the only section dealing with this type of liability. The textbooks of 1938 and 1944 state that liability of the employer for his employees must be admitted in case of fault of the employer in the choice of the employee or in the supervision of his work.[36] This application of the Roman law principle of *culpa in eligendo vel in custodiendo,* common to the imperial law, is recommended by the textbooks. The available court decisions do not afford sufficient material to draw any definite conclusion as to the filling of the lacuna.[37] The recent study by Agarkov (1945), though it supports the same point of view, fails to refer to any court decision.[38]

There is a similar gap in statutory provisions concerning the liability of a corporation (legal entity) for torts committed by its organs (agencies). Section 16 of the Civil Code provides for such liability only in instances of breach of contracts and other legal transactions made in the name of the corporation. However, this gap was filled by the decisions of the courts which consider the corporations liable for torts committed by their agencies within their jurisdiction.[39] The textbook of 1944 emphasizes that a corporation is liable for its agencies, if they acted within their duties and are at fault.[40]

Prior to 1937, the R.S.F.S.R. and the Ukrainian Supreme Courts refused to entertain actions instituted by individual members of a collective farm, filed against such farm for damage caused to the member. In 1937

[36] 2 Civil Law Textbook (1938) 408; 1 Civil Law (1944) 332.
[37] For cases, see *ibid.;* also Varshavsky, *op. cit.,* note 17, 65 *et seq.*
[38] Agarkov, *op. cit.,* note 1, 147 *et seq.*
[39] "U.S.S.R. Supreme Court, Civil Trial Division, Decision" (1939) Soviet Justice No. 12, 66.
[40] 1 Civil Law (1944) 332.

these decisions were reversed, and such actions admitted.[41]

5. Liability of Government Agencies for Acts of Their Officials

Under the imperial law the general rule was that the treasury is responsible for damage caused by officials while acting in the discharge of official duties.[42] Wherever an official committed an illegal act, he was personally liable for damages.[43] Therefore, the original draft of the soviet Civil Code contained a proposal of a rather broad responsibility of governmental agencies for individual officials. But the committee of the All-Russian Central Committee changed the draft, considering that liability "may impose a too heavy burden on governmental institutions . . . it should be established by a special statute, and as a general rule it would be too dangerous now in our conditions."[44] This explains the language of Section 407 of the Civil Code, which begins with the declaration of the liability of the government institutions but immediately after states a qualification which in fact turns the liability into an exception. The section reads:

> 407. An institution shall be liable for injury caused by improper acts of an official thereof committed in the performance of his duties, but only in the cases specially prescribed by

[41] *Ibid.*

[42] Sections 684, 687, Civil Laws, Svod Zakonov, Vol. X, Part 1 (1906 and 1914 eds.) as interpreted by the Ruling Senate, General Assembly Decision No. 52 of 1892; Civil Division, Decisions No. 490 of 1875; No. 162 of 1878; No. 69 of 1889; No. 56 of 1900.

[43] *Id.*, Sections 677–681; Section 1331 of the Code of Criminal Procedure of 1864; Sections 1316–1336, Code of Civil Procedure of 1864, as amended.

[44] Stenographic records of the All-Russian Central Executive Committee, 9th Committee, 4th Session, Bulletin N8 (in Russian) 19. See also Magaziner, "Responsibility of Institutions for Injury Caused" (in Russian 1926) Messenger of Soviet Justice No. 23. See Varshavsky, *op. cit.* 180.

law, provided that the improper nature of the acts of the official is recognized as such by a competent judicial or administrative authority. The institution shall be absolved from liability if the person injured fails to file an appeal from the improper act in due time. The institution shall have the right, in turn, to deduct from the wages of the official to the extent of the compensation paid to the injured person.

Thus, Section 407 established the general principle that governmental institutions are not liable for any improper or irregular acts of officials, because such liability takes place "only in the cases especially prescribed by law" and such cases are very few (see *infra*). To relieve the treasury from liability for acts of governmental officials was the exact intention of the legislation (see *supra*). But even in case a special law provides for liability, Section 407 contains another restriction. The improper nature of the official act must be established by a competent judicial or administrative authority, and in addition the aggrieved party must make an appeal in due time against the act causing injury. Such appeal must be made before the filing of complaint for damages with the court.[45]

In view of the business activities of the soviet State, the definition of the terms "institution," "official," and "acts in performance of official duties" used in Section 407 is of high importance. The soviet courts and recent soviet writers have tended to give a narrow construction to these terms. By "institutions" are meant primarily governmental agencies exercising public authority, in contrast to government enterprises engaged in economic activities.[46] The latter are fully responsible under Sections 117–119 of the Civil Code for their officers and

[45] 2 Civil Law Textbook (1938) 410.
[46] Varshavsky, *op. cit.*, note 17, 183; 2 Civil Law Textbook (1938) 409; 1 Civil Law (1944) 333.

employees, when these are performing economic functions. However, in many instances governmental institutions discharging public functions employ officials who do not, properly speaking, exercise public authority but are engaged in economic or technical activities, e.g., chauffeurs, engineers. Does Section 407 apply to their acts? The general inclination of recent writers and court decisions is to limit the principle of Section 407 to acts of government agents performed in the exercise of public authority.[47] Thus, in a decision of the supreme arbitral tribunal settling disputes between government-owned quasi corporations, it is stated:

> From the text of Section 407 . . . it follows that this section contemplates illegal administrative orders of officials . . . and not acts connected with the exercise by a governmental institution or enterprise of economic functions assigned to it.[48]

However, the R.S.F.S.R. Supreme Court has not always been consistent and has denied the liability of a hospital for unskillful treatment by the doctor employed there.[49] Any doubts in this respect have been dispelled by the U.S.S.R. Supreme Court in a recent Ruling of June 10, 1943, which, in line with the opinion of the writers referred to above, states as follows:

> Many errors have occurred in the decisions of the courts in cases involving liability of institutions for the acts of officials under Section 407 of the Civil Code. Under this section, the courts have often decided disputes over damage caused by officials in the performance of the economic and technical functions of a given institution, whereas Section 407 contemplates

[47] Varshavsky, *op. cit.*, note 17, 186 *et seq.*; 2 Civil Law Textbook (1938) 409: 1 Civil Law (1944) 334.

[48] Supreme Arbitration Tribunal Attached to the Council of Labor and Defense, Decision of February 1, 1924, 4 Practice of Arbitration Tribunals (in Russian) No. 333.

[49] (1937) Soviet Justice No. 9, 52; 1 Civil Law (1944) 334.

liability of institutions for improper acts of officials in the field of public administration. . . .

In order to alleviate the above-mentioned errors, the U.S.S.R. Supreme Court has issued the following directive: . . .

4. Only claims filed against governmental institutions for reparation of injuries caused by officials through improper discharge of official duties in the sphere of public administration, come under the provisions of Section 407 of the Civil Code. In such cases, financial liability may be imposed upon a governmental institution only if there is a special law establishing such liability (e.g., Section 21 of the Law of March 28, 1927, Concerning Requisition and Confiscation, R.S.F.S.R. Laws, text 248; Section 7 of the Statute on Maritime Pilots, U.S.S.R. Laws 1934, text 410; and others), provided that the person injured has appealed from the improper acts of the official and such acts were recognized to be incorrect by a judicial or administrative body. Liability for damage caused by public officials in the performance of the economic or technical functions of a given institution shall be determined conformably to the general provisions of Section 403 of the Civil Code.[50]

6. Special Laws Establishing Liability

Section 407*a* enacted in 1928,[51] is in effect a special law. It summarized several previously issued decrees and court decisions.[52] It established the responsibility

[50] U.S.S.R. Supreme Court, Plenary Session, Ruling of June 10, 1943, Civil Code (1943) 239.

[51] Civil Code, Section 407*a*. An institution shall be liable for the acts of its officials committed within their jurisdiction, and for their omissions in the performance of their duties, found to be improper, illegal, or criminal by a proper judicial or administrative authority, in cases where the person injured has deposited property (in particular, sums of money) with the institution or with the official in compliance with a legal duty or a judicial decision, sentence, or order, or an order of an official based thereon, or with the rules of internal organization of a governmental institution. An institution is liable on the same grounds in cases where the property was deposited for the benefit of the injured person (Enacted April 6, 1928, R.S.F.S.R. Laws, text 355).

Joint Circular Letter of the U.S.S.R. Commissariat for Justice and the Federal Police Office of 1933, No. 212:

Under Section 407-a, the organs of police are civilly liable for property which was delivered to the police officer by the party injured, was taken from him, or was otherwise received by the police officer in connection with the discharge of his duties. Civil Code (1943) 222.

[52] Varshavsky, *op. cit.*, note 17, 198.

of governmental agencies for money and other property deposited in execution of a court decision or another legitimate order of the authorities. Another special provision for liability on account of acts of officials is to be found in Section 7 of the Statute on Governmental Marine Pilots:

The State is liable for damage to ships caused by the fault of a governmental marine pilot; however, the liability shall be limited to the amount of the marine loss fund for the given port, which fund is formed by a 10 per cent deduction from the pilot fee.

Suit for compensation for damage in such cases may be filed solely in the competent judicial and arbitration organs of the U.S.S.R. and the constituent republics against the chief of the port to whom the pilot is subordinate.[53]

Liability for illegal confiscations is established by Section 21 of the Law of 1927 on Requisition and Confiscation.[54] Liability of post offices for mail shipments is regulated by the Resolution of the Council of People's Commissars of November 20, 1933.[55] The recent soviet books do not mention any other special laws.

IV. Damages

1. Reparation Means Damages

In defining the obligation of the tortfeasor, the framers of the soviet Code used a rather obscure expression, stating that "reparation of injury shall consist in the restoration of the condition existing before the injury" (Section 410). However, the clause immediately following makes it clear that in reality the tortfeasor has to pay damages. Thus, "to the extent to which such restoration is impossible," the reparation shall consist

[53] Section 7, U.S.S.R. Laws 1934, text 410.
[54] R.S.F.S.R. Laws 1927, text 248.
[55] *Id.* 1933, text 405; *id.* 1935, text 402.

"in the compensation for damage caused" (*id.*). The textbooks of 1938 and 1944 explain these clauses in terms reminding one of Sections 660 and 671 of the imperial Civil Laws, as follows:

> If a thing owned by the person injured is damaged, the person liable must repair it. If the thing was lost, the person liable must supply another of the same kind. It will appear often that in reality reparation in kind would be tantamount to the payment of a certain sum of money by which the person injured is able to restore the state of things antecedent to injury. The restoration of such a state must also take place in case of personal injury. For example, in cases of injuries affecting health, the person responsible therefor must help the person injured to restore his health by paying his bill for medical treatment. In particular, as the U.S.S.R. Supreme Court ruled, the tortfeasor is obligated to reimburse the expenses for special services needed because of the injury and not available at the home of the injured. The restoration of the previous state may require such a measure as the publication of the court decision in the newspapers. For example, in case of slander or libel, the restoration of the former state, i.e., restoration of good reputation by means of such publication, will appear the most appropriate method to repair the injury. Section 410 of the Civil Code gives the court sufficient reason for application of measures of this kind. Regardless of what constitutes the restoration, only property in one form or another may be claimed from the tortfeasor . . .
>
> If restoration is impossible, the person injured is entitled to compensation for damage caused, i.e., compensation in money for damage to property . . . The soviet law in force does not provide for monetary compensation for so-called non-material damage.[56]

The view prevails among soviet writers[57] that no compensation for nonproperty damage may be awarded, and this is consistently followed by the courts. As under the imperial Russian law, the soviet law does not afford compensation for other than property damage. No com-

[56] 1 Civil Law (1944) 330; 2 Civil Law Textbook (1938) 399.
[57] *Ibid.*; Varshavsky, *op. cit.*, note 17, 46.

pensation may be granted for mental anguish, pain, or other suffering, not accompanied by material loss.

The Ukrainian Supreme Court said:

> Although health and the integrity of the human organism are values protected by the soviet law, a bodily injury may be the reason for . . . property claims only where such injury caused property damage to the person injured.[58]

2. Limited Concept of Damages

The soviet courts and writers have tended to give a narrow construction to the notion of damages in cases of tortious injury. Damages are defined in the Civil Code by a formula covering all cases in which one fails to perform his obligation, whether such obligation arises under a contract or on other grounds, including torts. The damages thus generally defined include "not only the positive loss to property but also loss of such profit as would occur under normal conditions of trade" (Section 117). In spite of the clear language of the statute, the soviet courts and writers sought to restrict this formula so as to exclude "speculative profit alien to the

[58] Ukrainian Supreme Court. Civil Division, December 4, 1926. (In Russian 1927) Messenger (Vestnik) of Soviet Justice No. 4. For other cases see Varshavsky, *op. cit.*, note 17, 44. Here follows one of these cases:

> M was placed in a sanitarium owned by the defendant physician, for the treatment of a "severe psychosis." The doctor, although informed that M "has been taken out of a noose," failed to take due precautions, and during the night M hanged himself. The widow and daughter sued for support. The provincial court found that, although the death occurred through the defendant's fault, the expert testimony showed that the psychosis was incurable and that the deceased had lost 100% of his earning capacity some time before his death and could not have supported the claimants. Therefore, the court denied recovery, because the family of the deceased did not suffer any "material loss" because of his death. The R.S.F.S.R. Supreme Court. Civil Division, affirmed, ruling that "the court correctly refused to apply . . . Section 406 because the concept of monetary compensation for 'moral injury' is alien to the soviet notion of law." R.S.F.S.R. Supreme Court, Civil Division, January 13, 1927, (in Russian 1927) Judicial Practice No. 6, 10. Abstract of the case by Holman and Spinner, *op. cit.* 32 was used here in part.

Civil Code," even in instances of breach of contract.[59] With regard to tortious injuries, the tendency is to exclude altogether loss of profits in cases of damage to property and to restrict the appraisal of earnings in case of personal injury. The sum adjudicated to the person injured must, according to the R.S.F.S.R. Supreme Court, "correspond to the damage calculated in money as of the day of injury and not by calculating the probable future losses; this rule relates equally to pensions in cases of death or bodily injury."[60] An exception from the prohibition of anticipation of any future situation was made only for the benefit of minors. If a minor who had no earnings was crippled in an accident, the courts were permitted to award a pension payable from the date when the minor reaches the age of normal capacity to work (sixteen years), "in accordance with the minimum which will be established by social insur-

[59] R.S.F.S.R. Supreme Court, Civil Division, Letter of Instruction No. 1 of 1927 (1927) Judicial Practice No. 2, 12; Varshavsky, *op. cit.*, note 17, 26 *et seq.* The problem of damages for profit lost in contractual relations is discussed in Chapter 12, Contracts. The following case abstracted in Varshavsky, *op. cit.*, note 17, 27 (Izvestiia 1926, No. 128) may be referred to as an illustration of the tendency toward a narrow construction of damages. A translation of a play, submitted to the governmental theater and scheduled for performance was lost by the management of the theater before the first rehearsal started. The play was never performed. The lower court adjudged damages to the translator on the basis of royalties for a play that had average success. The Supreme Court set this decision aside and ruled that the translator was entitled only to such damages as would cover the expenses of restoring the translation. Under the new law of copyright of October 28, 1928 (R.S.F.S.R. Laws 1928, text 861, Section 39, see Vol. II, No. 28), the translator would probably have received full stipulated royalty.

[60] "The Court, in fixing compensation for damage under Sections 403–415 of the Civil Code, must fix a definite amount in favor of the injured party; this sum must correspond to the damage calculated in money as of the day of injury (Section 403 of the Civil Code) and not by calculating the probable future losses; this rule equally relates to pensions under Sections 413–415 of the Civil Code. A decision which provides not only for the pension due at the given time but also for its increase in the future is apparently dependent on the occurrence of one condition or another and is therefore incorrect, for the increase or decrease of the amount adjudicated may be obtained in the future by filing a new suit by reason of new circumstances." R.S.F.S.R. Supreme Court, Plenary Session, Ruling of May 17, 1926, Protocol No. 8, (1926) Soviet Justice No. 26; Civil Code (1943) 224.

ance at the time of his reaching such capacity."[61] Restating the previously established practice, the U.S.S.R. Supreme Court ruled on June 10, 1943:

> 11. If bodily injury is inflicted on a minor who did not have any earned income at the time when the injury occurred, the court may, upon complaint of the minor or his guardian, adjudicate the tortfeasor to pay the expenses . . . incurred for special care, special food, diagnoses, and treatment, and may also issue a declaratory judgment recognizing the right of the injured person, upon his reaching the age of sixteen years, to compensation for loss of working ability.[62]

3. The Time from Which Compensation Is Due

The R.S.F.S.R. Supreme Court has ruled:

> A person injured has the right to compensation for injury

[61] The R.S.F.S.R. Supreme Court ruled on May 16, 1926:

> Neither Section 404 of the Civil Code nor the general rules concerning the statute of limitations permit the interruption of the running of the statute during minority. Consequently, suits on behalf of a minor must be filed by the minor's representative within the limitation period fixed. The amount of damages must be based upon the data existing at the time when the right to compensation arose. Although at the time of the accident the injured party as a minor had no earnings, nevertheless his man power is lost or reduced for the future. Therefore, the court, in determining the case, must also adjudicate a pension which shall be counted from the day of the minor's reaching his labor capacity age (sixteen years), in conformity with the minimum which at this time shall have been fixed by social security on the basis of the average wage of an unskilled laborer. No new suit need be filed on reaching the age of capacity, and the injured party may submit to the court marshal a writ of execution together with a note from the local social security board concerning the minimum social security rate fixed on the basis of the average wage of an unskilled laborer in the given locality. The injured party is entitled, on reaching the age of capacity, to ask the court for increase of such annuity, if the data are established at that time showing that he undoubtedly would have obtained a higher qualification than that of an unskilled laborer, as well in the presence of any other circumstance justifying the increase in compensation (R.S.F.S.R. Supreme Court, Plenary Session, Resolution of May 16, 1927, Protocol No. 9; Civil Code (1943) 225).

[62] U.S.S.R. Supreme Court, Plenary Session, Ruling of June 10, 1943. Civil Code (1943) 242. The age up to which the payments to the minor must be made was determined in conformity with Section 5 of the Statute on Aids and Pensions (U.S.S.R. Laws 1930, text 132) as sixteen and, if the minor is pursuing studies in an educational institution, then eighteen (R.S.F.S.R. Supreme Court, Plenary Session, Resolution of July 23, 1929, Protocol No. 9; *id.* 223). This also applies to damages for loss of support.

from the day when injury was inflicted and not from the moment when he filed the complaint with the court.[63]

As a general rule, the right to sue under Sections 403 and 404 and following of the Civil Code arises only from the time when the plaintiff could, and ought to, know of the damages sustained by him, that is, in case of injury, from the day when the damage was ascertained.

The party injured cannot commence suit while, on the basis of Section 414, the question has not been preliminarily decided whether he is to receive full or partial compensation for damage under the Social Insurance Law, and until the answer to his timely petition for said determination has been received by him.[64]

V. Damages for Bodily Injury (Including Death)

1. Limitation of Amount of Damages by Social Insurance Benefits

A particular feature of the soviet law of torts is that, with regard to the amount of damages, a distinction is drawn between injury caused to property and bodily injury, including death. In both instances only property damage is compensated (see *supra*). However, in instances of injury to property the amount of damages is not subject to any particular limitation except the narrow construction of damages discussed above. But in case of bodily injury, the compensation may as a rule not exceed benefits available under social insurance. The R.S.F.S.R. Supreme Court explained the underlying idea, as follows:

> Pensions and aids awarded to persons injured by so-called accidents, for an injury as well as for a death, even though included in the chapter dealing with obligations arising as the result of causing injury to another, are determined on a princi-

[63] R.S.F.S.R. Supreme Court, Presidium, Resolution of April 28, 1928, Protocol No. 17, paragraph 5; Civil Code (1943) 217.

[64] *Id.*, Plenary Session, Resolution of November 16, 1925, Protocol No. 19; *id.* 219.

ple different from that of bourgeois civil law. Our rule of compensation in such cases is based on the principle of social insurance: even when the claimant was not injured in an enterprise by which he is insured, no one can receive either a capitalized sum or a sum greater than that awarded to insured employees (Section 415).[65]

Thus, under the provisions of Sections 409, and 412–415, liability for bodily injury appears as a mere supplement to social insurance.[66] If the injury is caused by an event covered by social insurance, no additional liability arises, as a rule (Section 412). Moreover, an injured person who is not insured may claim from the person who caused the injury no more than socially insured workers or clerical employees are allowed. The selection of the particular category of workers or clerical employees by reference to whose rates the uninsured person is to be compensated, is left to the discretion of the court (Section 415). The court must take into account the property status and "social usefulness" of the person injured (*ibid.*). In this connection it may be mentioned that collective farmers, i.e., the bulk of the agricultural population, do not come under social insur-

[65] *Id.*, Ruling of January 17, 1927 (1927) Judicial Practice No. 2, 4. Translation by Holman, *op. cit.* 31.

[66] Although the letter of Sections 413–415 may induce one to think that they are applicable to any kind of injury, such an interpretation is correctly rejected by the soviet writers and courts because these sections clearly provide for such injuries only as are subject to social insurance, and the latter does not extend to damage to property (1 Civil Law (1944) 346; 2 Civil Law Textbook (1938) 411; Varshavsky, *op. cit.*, note 17, 208. For a different rejected point of view see *supra*, Chapter 14, 5 and 6). Thus, the Labor Code, Section 176 (as amended August 26, 1929, R.S.F.S.R. Laws, text 640) reads:

176. The social insurance system shall comprise: (a) the granting of medical attendance; (b) the granting of benefits in case of temporary loss of working capacity (sickness, injury, quarantine, pregnancy, confinement, case of a sick member of the family); (c) the granting of supplementary benefits (for the nursing of infants, requisites for nursing, funerals); [(d) repealed;] (e) invalid pensions; (f) old age pensions; (g) the granting of pensions to members of the family of persons employed for remuneration in case of the loss of the breadwinner (death or absence without knowledge of his whereabouts).

ance. This raises a particularly difficult problem not yet solved in a definite manner by legislation or court decisions.

However, an insured as well as an uninsured person may in specific instances obtain "full compensation" above the insurance premium. Here the soviet Code evidently took into account the fact that the social insurance premium, being calculated by certain standards, may not cover the actual damage. It is also possible that no radical rupture with the practice of the imperial regime beneficial to the workers was desired. Under the imperial regime, the courts held that, first of all, the full actual damage suffered by a worker as the result of an accident must be established. If the various aids which he may receive from workmen's compensation, social or other insurance, do not cover the damage, the injured worker has the right, in case of a labor accident, to sue the person causing the injury, in particular his employer, for the difference.[67]

Under the soviet Civil Code, if the injury was caused by pure accident, i.e., a fortuitous event for which no one is to blame, and the person injured was insured against such an accident (insurable event), the insurance premium is the only compensation he can receive (Sections 412, 413, paragraph 1). Likewise, in such case, an uninsured person can receive no more than the amount of the insurance premium (Section 415). But if the injury was caused by "a criminal act or omission" of the entrepreneur, the injured party may claim from him the difference between the actual damage ("full reparation") and the sum obtained from social insurance (Section 413, paragraph 3; Section 414). The

[67] Ruling Senate, Civil Division, Decisions 1907, No. 23 and No. 40.

R.S.F.S.R. Supreme Court has held that the "act or omission" need not necessarily constitute an offense punishable under the Criminal Code nor be established in a criminal proceeding. It suffices that a specific violation of safety rules and failure to take precautionary measures is established in a civil case.[68] In such cases, the social insurance agency is subrogated to the person injured and may claim reimbursement of payments made by the agency from the person responsible for the injury (Section 413, paragraph 2; Section 414).

2. Damages in Case of Death

Again, the rules applicable in case of bodily injury are different from those applicable in case of death. Only the person injured may claim compensation for mere bodily injury. Neither his heirs, if he dies for another reason, nor his dependents may institute a suit.[69] But in the event that the injury culminates in the death of a person, Section 409 grants a certain right to compensation to his destitute dependents. As the R.S.F.S.R. Supreme Court explained:

> Section 409 gives the right to receive compensation to those persons dependent on the deceased who have no other means of livelihood. The question of whether the claimants have other means sufficient for livelihood is to be determined by the court on the facts of the case.[70]

Thus the court may deny recovery if the claimants have sufficient means or are "already receiving from social

[68] R.S.F.S.R. Supreme Court, Ruling of June 9, 1924, Protocol No. 12; *id.*, Civil Division Report for 1928, quoted from 2 Civil Law Textbook (1938) 412.

[69] 2 Civil Law Textbook (1938) 411; Varshavsky, *op. cit.*, note 17, 211 *et seq.*; 1 Civil Law (1944) 346.

[70] R.S.F.S.R. Supreme Court, Civil Division, Conference of Justices, Protocol No. 3, February 18, 1927 (in Russian 1927) Judicial Practice No. 7, 22. Translation by Holman and Spinner, *op. cit.* 31.

insurance a pension . . . which, in the court's opinion, is fully adequate."

A general tendency to restrict the amount of compensation is in evidence, although it seems that the lower courts are more liberal. At least in the Ruling of the U.S.S.R. Supreme Court of June 10, 1943, the following practices were defined as erroneous:

> In cases instituted under Section 409 of the Civil Code, the courts fail to clarify the property status of the plaintiffs and their ability to support themselves by personal labor; granting relief upon the complaint of a dependent of the decedent, the courts often adjudicate compensation to the full extent of the earnings of the decedent as of the date of the accident, overlooking the fact that a portion of his earnings was spent by the decedent for his personal needs.

The same ruling carried the following provisions:

> 5. By virtue of Section 409 of the Civil Code, the right to compensation for injury causing death belongs to persons who were actually dependent upon the decedent and who have no other means of livelihood. The right to compensation under Section 409 of the Civil Code belongs, in addition to persons who were actually dependent upon the decedent, also to persons who, not being dependents of the decedent, were nevertheless entitled by operation of law to receive maintenance from the decedent (e.g., minor children or disabled and destitute parents). The courts shall determine compensation in such cases in accordance with the share of the decedent's earnings expended for the maintenance of members of his family and dependents. If, upon the death of the earner, members of his family receive social insurance pensions, such sums shall be deducted by the court from payments adjudicated from the person causing the injury. Where compensation for injury is adjudicated to several persons under Section 409 of the Civil Code, the decisions must recite precisely the amount and the period of time for which compensation is due to each plaintiff.[71]

[71] U.S.S.R. Supreme Court, Plenary Session, Ruling of June 10, 1943, Civil Code (1943) 237, 240. See also *supra*, note 62.

When the right to compensation exists:

It belongs to the given persons independently, originates with them, does not pass to them by inheritance, and therefore does not depend upon the testamentary dispositions of the deceased and is not subject to the inheritance tax.[72]

Compensation to destitute dependents of a person whose death was caused, payable under Section 409, comes under all the limitations discussed *supra* under V, 1.[73]

3. Compensation for Simultaneous Damage to Property

If, simultaneously with death, damage to property of the deceased was also caused, e.g., the felonious burning of a house occasions injuries to the owner which culminate in his death, his destitute dependents are entitled to compensation under Section 409. The right to bring suit for damage to the property belongs to his heirs. Thus, his dependents who come under the provisions of Section 409 may likewise claim such compensation when they are also his heirs, as has been held by the R.S.F.S.R. Supreme Court.[74]

4. Compensation for Bodily Injury Must Be Paid in the Form of Annuities

Although there are no statutory provisions to this effect, this rule is stated by the textbooks of 1938 and

[72] Goikhbarg, 1 Economic Law (in Russian 1923) 128, (1925) 175. In spite of this correct statement, Goikhbarg advocated an erroneous theory, that "as a general rule, the right to compensation belongs to the person injured" and Section 409 is "an exception." This error was followed by Holman, *op. cit.* 31. In fact, there are different rules for cases of death and for cases of bodily injury, and not a rule and an exception.

[73] 2 Civil Law Textbook (1938) 413.

[74] R.S.F.S.R. Supreme Court, Plenary Session, Ruling of July 4, 1927, (1927) Judicial Practice No. 16, 2; 2 Civil Law Textbook 411; 1 Civil Law (1944) 346.

1944 as a general principle and was reaffirmed by the Ruling of the U.S.S.R. Supreme Court on June 10, 1943, in the following words:

> 24. The decision of the court must recite in detail the circumstances under which the injury was caused and must contain a precise calculation of the damages adjudicated. Damages occasioned by injury to health (maiming, crippling) shall be adjudicated in the form of periodical monthly payments by the defendant to the plaintiff during a period of time or for life, depending upon the permanence of the loss of earning capacity.[75]

Two exceptions to this rule are admitted. Thus, if an enterprise paying annuities is assigned for liquidation, it must deposit the capitalized sum with the social insurance agency.[76] The Resolution of the Thirty-sixth Plenary Session of the U.S.S.R. Supreme Court of February 22, 1932, prescribed this procedure in cases of liability of a foreign shipowner for injury caused to soviet citizens.[77] The textbooks of 1938 and 1944 give the same reasons for the principle of annuities, as follows:

> Such method of payment corresponds to the manner in which soviet citizens usually get their earned income. Capitalization of annuities and payment to the person injured or his dependents of a lump sum in full satisfaction of the claim arising from injury is inadmissible. The payment of a lump sum would contradict the purpose of a real compensation. The injury from the loss of earnings lasts continuously. The person injured will not obtain such income as he would have obtained . . .[78]

[75] U.S.S.R. Supreme Court, Plenary Session, Ruling of June 10, 1943, Civil Code (1943) 246.

[76] Act of November 23, 1927, U.S.S.R. Laws 1927, text 661. The Ukrainian Civil Code contains provisions to this effect in Sections 415–415[4].

[77] 1 Civil Law (1944) 348.

[78] *Ibid.*, also 2 Civil Law Textbook (1938) 414; also Iaichkov, Obligations Arising from Injuries (in Russian 1939) 27.

The reason given above for the prohibition of lump sum compensation for bodily injury or death does not appear very convincing. The same argument may apply to the loss of any income-bearing object. It seems that behind this prohibition stands the general soviet policy of preventing formation of capital other than that destined for consumption. Under the prerevolutionary law, the person injured had the choice of an annuity or a capitalized lump sum. (Civil Laws, Sections 676, 683, *Svod Zakonov,* Code of Laws, Volume X, Part 1.)

The soviet writers and courts agree that annuity adjudicated as compensation for injury comes under the rule established for alimony claims of children against their parents, viz., it may be increased or decreased by the court upon a new complaint, if the working capacity of the injured person has changed for the better or the worse.[79] The U.S.S.R. Supreme Court expressly ruled to this effect on June 10, 1943:

> 15. Should the material standing of the parties or the state of health of the person injured be substantially changed after the court decision is rendered (e.g., his earning capacity increase or decrease), the person injured, as well as the person causing the injury, may bring an action in the court, for a corresponding reduction or increase in the amount of compensation adjudicated for the injury.[80]

5. Method of Computation of Earned Income and Its Compensation

The rulings of the R.S.F.S.R. Supreme Court have established a highly restrictive method for computation of the earned income of the person injured and the com-

[79] Varshavsky, *op. cit.*, note 17, 213; 2 Civil Law Textbook (1938) 415; R.S.F.S.R. Supreme Court, Ruling of June 20, 1927, Protocol No. 11 (in Russian 1927) Judicial Practice No. 13, 1. See also comment to Sections 413–415 of the Civil Code, Vol. II, No. 2.

[80] Civil Code (1943) 243.

pensation therefor in case of bodily injury. Some of these restrictions were overruled by the recent comprehensive Ruling of the U.S.S.R. Supreme Court of June 10, 1943, but many of them were sustained. Thus, until this ruling, only the basic wages were to be compensated. It depended upon the court whether the commission and percentage compensation were to be taken into account in determining the earnings. "All kinds of other additional earnings, such as wages received for another job held simultaneously, income from literary and other outside work, were not to be taken into account in accordance with the established practice of the courts." [81] But, as before, the ruling of 1943 instructs the court that in case the capacity to work in trade is affected, the court should, nevertheless, deduct from compensation the amount which the person injured may earn as an unskilled laborer according to his capacity. At present, the soviet courts have to observe the instructions contained in the above-mentioned Ruling of June 10, 1943,[82] as follows:

6. Reparation of injury to health (disability) shall be made by adjudication of the damages ensuing from the loss of earnings of the injured person. The amount of damages shall be determined in accordance with the degree (percentage) of the

[81] The textbook of 1938 gave the following summary of the established rules:

The court, in determining damages, must take as a basis the actual earned income of the person injured at the time of the injury. As a rule, his basic wages must be considered as earned income. If, in addition to the basic wages, the person injured had received a commission or percentage compensation, the court has to decide whether such compensation constituted earned income. All kinds of other additional earnings, such as wages received for another job simultaneously held, income from literary or other work, shall not be taken into account in accordance with the established practice of the courts. The earned income shall be calculated as of the day of injury, disregarding possible future damage. 2 Civil Law Textbook (1938) 412, 413. R.S.F.S.R. Supreme Court Decisions summarized here are: Rulings of May 17, 1926, Protocol No. 8; of April 2, 1927, Protocol No. 7; of July 4, 1927, Protocol No. 12; of January 17, 1927, Protocol No. 2.

[82] U.S.S.R. Supreme Court, Plenary Session, Ruling of June 10, 1943; Civil Code (1943) 240–242.

injured person's loss of working ability and his average earnings for the twelve calendar months preceding the accident, or for two calendar months in case of temporary disability.

7. In determining the average earnings of the injured person, not only are the basic monthly wages at his place of permanent employment at the time when the injury occurred to be taken into account, but also any other earnings the injured person regularly received. The average monthly earnings of persons who do not live on wages (writers, artists, craftsmen, and the like) shall be calculated by dividing their annual earnings for the preceding year by twelve.

8. If, in consequence of bodily injury, there is partial loss of capacity to work in trade and to work in general, the amount of compensation shall be determined in proportion to the degree (percentage) of the loss of capacity to work in trade; where the capacity to work in trade is lost completely but the person retains to an extent the general capacity to earn, reparation shall be diminished by the sum which an unskilled laborer or salaried employee enjoying the degree of general capacity retained would earn.

9. In determining the amount of compensation for bodily injury, the court must take into account the pension or aid given to the injured person under social insurance or social security and deduct the corresponding sum from the compensation adjudicated. Where, at the time of trial, the grant of pension or aid has not yet been decided by the trade organizations and social security agencies, the court shall suspend proceedings under Section 113, subsection (e), of the Code of Civil Procedure.

10. If, in consequence of bodily injury, the person injured is unable, according to expert medical opinion, to take care of himself, the court shall adjudicate from the person responsible for the injury, in addition to compensation for the disability to earn, also payment for the expense of caretaking.

The court may also impose upon the person responsible for the injury the duty to compensate the person injured for actual expenditures for special food, artificial limbs, and special treatment, including treatment in a sanitorium or summer resort, if the injured person actually required such treatment according to expert medical opinion and did not receive it free of charge through a competent organization . . .

The R.S.F.S.R. Supreme Court instituted another restriction which evidently still obtains:

> Where the income of the injured party, who retained his old job in the same enterprise, has actually not been decreased after the injury as compared with his former income and the income of other workmen of the same category, the enterprise has the right to obtain a writ of execution, judicial decision, or interpretation of a judgment (Section 185 of the Code of Civil Procedure), authorizing it to deduct from the additional compensation fixed by the court the wages which the injured person is earning in the enterprise.
>
> In case he is discharged, the pension is collectible in full from the moment of the termination of his pay, in accordance with the determination of the court. Modification of such determination by reason of changed circumstances may be obtained only by filing a new suit.[83]

All these rules tending to restrict compensation for the loss of earned income, though rather unexpected in the law of a socialist state, are illustrative of a characteristic feature of soviet law. The soviet State is the principal owner of the mechanical devices which in our time are the main source of bodily injuries, likely to be treated as torts. Here, as in many other instances, the interests of individuals must give way when they collide with those of the soviet State.

VI. Conclusion

The development of the soviet law of torts reveals an interesting phenomenon. Provisions of the Civil Code which showed a departure from traditional concepts or a pushing to the extreme of some modern theories, proved to be impracticable and underwent in the court decisions and jurisprudential writings an interpretation tantamount to a return to such basic concepts

[83] R.S.F.S.R. Supreme Court, Plenary Session, Ruling of June 28, 1926, Protocol No. 9; *id.* 224, 225.

as the doctrine of fault. The soviet law of torts, as it stands at present in 1948, has in effect approached that of nonsoviet law. It seems that particular protection of the State but not of the poor, and a restricted method of computation of damages in instances of bodily injury, are the only striking features of the soviet law of torts in its actual operation. But these features make the soviet law less beneficial than the capitalist law for the person injured.

Chapter 16

Property

I. Right of Ownership

1. Preliminary

The right of ownership became regulated in soviet law only after the enactment of the Civil Code, in 1922. Prior to that the soviet legislation dealing with ownership was represented by a series of confiscatory decrees, which sought to dissolve the existing property rights (see Chapter 1, II). However, the provisions of the Civil Code dealing with ownership define the soviet law of property only to a limited extent. These provisions were enacted at the time of the New Economic Policy, when the soviet leaders decided to admit private ownership to the soviet system. At the same time, it was intended that government property should retain a privileged position and that certain of these privileges should be extended to ownership of co-operatives, which otherwise was put on an equal footing with private ownership. Hence the tripartite division of ownership into governmental, co-operative, and private, was provided for in Section 52 of the Civil Code. Nowhere was a principle stated governing the differences in the status of these categories of ownership. Several overlapping enumerations were given instead, specifying objects exempt from or subject to one or another form of ownership, objects withdrawn from civil commerce or private transactions, et cetera. In general, the compilers took the broad concept of ownership from the capitalist codes and outlined

the rights and privileges of an owner in a similar way. The main provisions of Sections 58–60 and 64 of the Civil Code might have been included in a civil code of any capitalist country. The pertinent provisions of non-soviet codes are quoted for the sake of comparison in note 1.[1] Thus, in full accord with the tradition of the codes of civil law countries, the soviet Civil Code declared that "within the limits laid down by law, the

[1] The following are a few of such definitions:

Louisiana Civil Code, Section 491: Perfect ownership gives the right to use, to enjoy, and to dispose of property in the most unlimited manner, provided it is not used in any way prohibited by laws or ordinances.

California Civil Code, Section 654: The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others.

Section 679: The ownership of property is absolute when a single person has the absolute dominion over it and may use it or dispose of it according to his pleasure, subject only to general laws.

Spanish Civil Code, Section 348: Ownership is the right to enjoy and dispose of a thing without further limitations than those established by law.

German Civil Code, Section 903: The owner of a thing may, insofar as the law or the rights of a third party admit, deal with the thing as he pleases and exclude others from any interference with it.

French Civil Code, Section 544: Ownership is the right of enjoying and disposing of a thing in the most unlimited manner, provided the thing is not made use of in a manner forbidden by law or regulation.

Austrian Civil Code, Section 354: Considered as a right, ownership is the authority to dispose of the substance and accessories of a thing at one's pleasure and to exclude therefrom any other person.

Swiss Civil Code, Section 641: Whoever is the owner of a thing can freely dispose of it within the limits of the law.

He has the right to reclaim it from anyone who takes it from him and to defend it against every illegal interference.

Imperial Russian Civil Laws, Svod Zakonov, Vol. X, Part 1, Section 430: The first to acquire property under a legal title, causing it to belong to him privately, and obtaining thereby *the power exclusively and independently of another to possess, to use, and to dispose of the property in a manner established by civil laws, in perpetuity and hereditarily, until he should transfer this power* to another, has the *right of ownership* in such property, as well as one to whom such power has been conveyed by the first who acquired it, directly or through subsequent legal transfers and conveyances. (Italics partly supplied.)

According to the draft of the imperial Russian Code of 1913, the owner has the right to possess (Section 17) and enjoy his property; he is entitled to derive all kinds of revenue from the property and, in general, to enjoy the property according to his pleasure (Section 18). The owner has the right to dispose of his property: he is entitled to alienate his property, to grant other persons rights upon the property, and to effectuate any kind of alteration of the property (Section 19).

The provisions of the soviet Code make the same statement in an abridged form.

owner has the right to possess, to use, and to dispose of his property" (Section 58). As a soviet textbook on civil law correctly remarks:

> The same elements, possession, use, and disposal of property, constitute the content of the capitalist right of ownership. Owners in a capitalist society exercise their right also "within the limits laid down by law." But the soviet property law was different [from capitalist law] even when it permitted private ownership of the instruments of production [under the New Economic Policy] in that the "limits established by [soviet] law" were different [from those in the capitalist countries].[2]

Likewise, in line with the capitalist codes the soviet Code declares the right of the owner to recover his property from unlawful possession of another.[3] The owner may also preclude any other infringement of his rights not depriving him of possession of his property (Section 59). The right to recover property from one who has acquired it in good faith is barred, unless the property was stolen from or lost by the owner. However, government property unlawfully conveyed by any means may be recovered from any holder, with the exception of negotiable instruments payable to bearer (Section 60). In case of recovery of property, the owner may claim restoration of or compensation for all revenues derivable from property during the period of conversion. However, such duty arises for a bona fide possessor only from the time he learned that his possession was unlawful or the process was served on him.

All these rules have no retroactive effect. Former owners whose property was confiscated "on the basis of

[2] Gintsburg, 1 Course 26.

[3] However, only the owner showing a title may institute the suit. Strangely enough, the soviet law does not protect possession as such, offering no remedies comparable to trover or trespass *de bonis asportatis*. An exception is the action available to the tenant under Section 170 of the Civil Code. 1 Civil Law (1944) 228, 232, 233, 246, 247.

revolutionary law or in general passed into the possession of toilers prior to May 22, 1922, have no right to recover such property" (Section 59, Note 2). By this provision most of the actual seizures accomplished in the early days of the soviet regime were elevated to title. But from the above date on, title to property is transferred by contract and is vested in the transferee upon the making of the contract if an individually defined thing is involved; otherwise the ownership passes upon delivery of the thing (Section 64). The soviet Civil Code also contains provisions concerning joint ownership by shares (Sections 61–63, 65–67) which show no departure from the civil law tradition and are not to be discussed here.

Thus, a nonsoviet jurist would look in vain for a new concept of ownership in the soviet Civil Code. The particular soviet features of this institution are disclosed only in a set of provisions barring private ownership of certain properties, totally or to a degree. These limitations are to be found in Sections 20–24 and 52–57. However, with the advent of socialization in 1929, the soviet law of property underwent drastic changes. Subsequent legislation and, especially, the 1936 Constitution, without formal amendment of the provisions of the Civil Code, introduced a new approach to the problem of ownership in general and, particularly, to the place of private ownership in the soviet legal system. This time certain broad statements were made, and new enumerations of the objects of governmental ownership were given. The new concepts lack juridical precision and are not co-ordinated with the provisions of the Civil Code. The situation as it stands now may best be explained by a comparative analysis of both sets of provisions.

2. Private Versus Governmental Ownership in the Civil Code

Having taken as a basis the traditional features of ownership (Sections 58–70), the compilers of the Code apparently attempted to define the status of private ownership within the soviet system by approaching the problem from two angles. They sought to define the limits of free trade in property, and provisions to this effect were placed under the heading "Objects of Rights (Property)."[4] These provisions describe things which are "withdrawn from civil (private) commerce,"[5] enumerate government properties "the title to which may not be conveyed to private persons,"[6] and specify the property which "may be subject to private transactions only within certain limits."[7] In addition, the compilers of the Code apparently intended to determine what could be held privately and to outline the limits of the sphere of private ownership. Provisions to this effect, placed in another part of the Code under the

[4] Civil Code, Sections 20–24.

[5] Here belong: land (*id.*, Section 21), arms, explosives, military equipment, aircraft, telegraph and radiotelegraph apparatus, annulled stocks and bonds, radium, helium, spirits of higher proof than that specified by law, as well as quick-acting poisons (*id.*, Section 23). Archive materials which are under the jurisdiction of the agencies of the archives administration may be the object of private legal transactions only where such material has been duly earmarked for destruction (archive waste) (*id.*, Section 23[a]).

[6] Here belong: (a) industrial, transport, and other enterprises taken as a whole; (b) industrial establishments, factories, plants, mines, et cetera; (c) equipment of industrial establishments; (d) rolling stock of railroads, aircraft, seagoing vessels and river craft; (e) installations serving transportation by rail, water or air, or public communication (telegraph, telephone, and radio installations for public use), hydrotechnical installations, and those designed to serve commerce in goods (grain elevators, cold storage plants, et cetera) as well as electrical installations for public use; (f) public utilities; (g) municipalized and nationalized buildings (Civil Code, Section 22).

[7] Here belong: gold, silver, platinum, and metals of the platinum group, in coin, bullion or raw metal, foreign exchange, instruments payable in foreign exchange (checks, promissory notes, money orders, et cetera), and foreign securities (stocks, bonds, bond coupons, et cetera) (*id.*, Section 24).

heading "Right of Ownership," [8] recite the kinds of property which may be owned by government only,[9] or may be held privately only by "government concession" [10] or "by permission of the authorities." [11] This set of limitations on private ownership is supplemented by an enumeration of the classes of property positively opened to private ownership,[12] and by a definition of the sphere of ownership of co-operatives.[13] In all instances, the compilers resorted to enumeration and failed to indicate the underlying principles and to co-ordinate the enumerations given in various passages. In fact, the provisions set forth under both headings constitute a single group dealing with the same subject matter, viz., the limitations imposed upon private business and private ownership.

The demarcation line was not firmly drawn. Property withdrawn from civil commerce may, nevertheless, become subject to private rights "within the limits expressly stated by law" [14] and, consequently, may become private property when and where the law allows. Likewise, property reserved for exclusive government ownership, e.g., land, may be held by a private person under a title other than ownership, e.g., toil tenure or building tenancy.[15] Thus, in keeping with the general un-

[8] Civil Code, Sections 53–57.

[9] Here belong: land, subsoil, forests, waters, railways in public use, and their rolling stock (Section 53).

[10] Here belong: enterprises employing a number of hired workers exceeding that specified by statute, telegraph and radio transmission stations, as well as other installations of importance to the State (*id.*, Section 55).

[11] Here belong: aircraft (Section 53), arms and military equipment, explosives, platinum and metals of the platinum group, their combinations and alloys, radium, helium, spirits (above the strength specified by law), and quick-acting poisons (*id.*, Section 56).

[12] Civil Code, Section 54, quoted *infra*, note 22.

[13] *Id.*, Section 57.

[14] *Id.*, Section 20: "Property withdrawn from civil commerce may be the object of private rights only within the limits expressly stated by law."

[15] *Id.*, Section 21: "Land tenure shall be permitted only in the form of

certainty of the New Economic Policy, the boundary line between the spheres of governmental and private ownership was made flexible.

The lack of coincidence in certain enumerations reveals the uncertainty of the situation. For instance, land is withdrawn from civil commerce (Section 21), but not only land but also "subsoil, waters, public railways, and their rolling stock" are reserved for exclusive government ownership.[16] Large industrial enterprises (with over twenty workers) may be privately owned only under a concession,[17] yet they are not classed with properties reserved for government ownership but with properties which, once governmental, may not be transferred to private persons.[18]

To unite all these provisions in a coherent system would be not only a difficult but also a superfluous task in view of subsequent legislation, which set new limitations to private ownership. Therefore, Section 54, wherein the species of property positively open to private ownership are enumerated, no longer expresses soviet law. The broad terms in which the sphere of private property is outlined therein, in fact are essentially reduced by subsequent acts.

mere right to use." Re building tenancy, see *id.*, Sections 71 *et seq.*, discussed *infra* II.

16 Id., Sections 21 and 53 quoted *supra*, notes 5 and 9.

17 *Id.*, Section 55 quoted *supra*, note 10.

18 *Id.*, Section 22, subsection (b) quoted *supra*, note 6. Likewise, arms, military equipment, explosives, aircraft, radium, helium, spirits of a certain strength, and quick-acting poisons, are withdrawn from private commerce (Section 23, see *supra*, note 5) and may be held by private persons only by permit (Section 56, see *supra*, note 11), but platinum and metals of the platinum group, which likewise may be held only by special permit, are classed, not with property withdrawn from private commerce, but with materials subject to private transactions within the limits specified by law, including gold, silver, and foreign exchange (Section 24, see *supra*, note 7). Trading in property of this kind was later reserved for the monopoly of the State Bank by a separate Law of January 7, 1937 (U.S.S.R. Laws

3. Subsequent Legislation: Constitution of 1936

Two later enactments may be said to embrace major changes: the Law of August 7, 1932,[19] and the 1936 Constitution.

Although the Law of August 7, 1932 is primarily a penal statute establishing the death penalty for the rather indefinite and broad crime of misappropriation (pillage) of public (socialist) property, it also marks an important phase in the development of the concept of ownership in soviet law. It introduced a new category: socialist property, designated also as public property. The preamble to the law declared that:

> Public property (government property, property of collective farms, and property of co-operatives) is the basis of the soviet regime. It is sacred and inviolable, and persons guilty of offenses against it shall be regarded as enemies of the people.

Thus, the newly established category of ownership not mentioned in the Civil Code, socialist (public) ownership, embraces government ownership, ownership of collective farms (unknown to the Civil Code), and ownership of co-operatives, which was treated in the Civil Code apart from government ownership and was linked with private ownership. For the first time under the soviet regime, the adjectives "sacred and inviolable," traditional since the 1791 French Constitution, were applied to property, but, in contrast to tradition, they were

1937, text 25, translated in Vol. II, No. 2, comment to Section 24). The whole group was thus withdrawn from the sphere of private commerce.

[19] U.S.S.R. Laws 1932, text 360. For its translation, see Chapter 20, p. 728.

Under the Edict of May 26, 1947, Vedomosti 1947, No. 17, the death penalty is replaced in peacetime by confinement in a camp of correctional labor for a period of **twenty-five years.** See also Edicts of June 4, 1947 discussed *infra* under 6.

applied not to private property but to the new category of socialist property.

This idea found further development in the 1936 Constitution. Section 131 restated the principle that "public socialist ownership is sacred and inviolable" and stressed the duty of soviet citizens to safeguard it. Moreover, Section 4 declared that "the economic foundation of the U.S.S.R. shall consist in the socialist system of economy and socialist ownership of the instruments and means of production . . . in the abolition of private ownership of the instruments and means of production."[20] Here a broad general principle is stated: the exclusion of the instruments and means of production from private ownership and their assignment to socialist ownership is designated as a hallmark of socialist economy and the basis of the soviet legal system. Socialist ownership is more closely defined and the objects of exclusive government ownership are also enumerated in greater detail. Thus, Section 5 distinguishes two forms of socialist ownership in the U.S.S.R.: (a) government ownership (the domain of all the people) and (b) ownership by co-operatives and collective farms. Still, certain types of property are not subject to ownership by collective farms or co-operatives but are reserved for the government. The enumeration of such property is

20 Regarding the republics incorporated in 1940 the soviet textbook comments:

In the constitutions of the soviet socialist republics of Lithuania, Latvia, and Estonia, incorporated in the Union in 1940, are some special provisions concerning property. Along with the socialist system of economy, small-scale industrial and commercial enterprises are permitted here within the limits laid down by laws. But even in these republics the basic form of ownership is the socialist ownership, while the capitalist ownership (small enterprises only) is admitted temporarily for the period of transition and the task of its final liquidation and a complete abolition of exploitation of man by man put forward in the constitutions of these republics (Section 4 of the Lithuanian Republic and corresponding sections of the constitutions of Latvia and Estonia).

1 Civil Law (1944) 224.

wider than that to be found in the Civil Code.[21] In addition to "land, subsoil, waters, forests, railways and their rolling stock" mentioned in the Civil Code, the Constitution (Section 6) reserves for exclusive government ownership "mills, factories, mines, water and air transport, banks, means of communication (postal service, telegraph, telephone, radio), large agricultural enterprises organized by the government (governmental farms, machine-tractor stations, and the like), public utilities, and essential housing in cities and industrial centers."

What, then, is left to private ownership? The language of the Constitution does not give a direct answer. "Private ownership" is directly mentioned only once in the Constitution, viz., in Section 4, where it is stated that "private ownership of the instruments and means of production is abolished in the U.S.S.R." However, Section 10 offers protection by law to something similar to, but not identical with, private ownership. "The law protects personal ownership of citizens," the section reads and then proceeds to specify the objects of such ownership: "earned income and savings, dwelling houses, auxiliary household economy, household effects and utensils, articles of personal consumption and comfort." Here the term "personal ownership" is different from "private ownership" as used in the Civil Code, and the enumeration of objects of personal ownership deviates from that of objects of private ownership given in Section 54 of the Code.[22] A few objects mentioned are

[21] Civil Code, Section 53. See *supra*, note 9.

[22] Civil Code, Section 54:

The following objects may be in private ownership: nonmunicipalized buildings; commercial enterprises; industrial enterprises employing a number of hired workmen not exceeding that fixed by special laws; instruments and means of production; money, securities, and other valuables, including gold and silver coin and foreign currency; household effects and articles

the same: "household effects and utensils, articles of personal consumption." Some are slightly different. Instead of "dwelling house," the Civil Code mentions "nonmunicipalized building," i.e., any building not taken over at one time or another by the government. Other objects may be the same, because Section 54 of the Code enumerates articles, such as "money, securities and other valuables, including gold and silver coins and foreign exchange . . . goods the sale of which is not forbidden by law," while Section 10 of the Constitution speaks in a general way of "earned income and savings." But other objects of property enumerated in Section 54 of the Civil Code obviously do not come either within Section 10 or within Section 4 of the Constitution. These are "commercial enterprises, industrial enterprises employing a number of hired workmen not exceeding that fixed by special laws, instruments and means of production." Section 54 of the Code also concludes the enumeration with a broad clause, "all property not withdrawn from private commerce." Because these clauses of the Civil Code are not restated in the Constitution, they may just as well be considered at present inoperative, according to the soviet jurists.[23]

4. Doctrine of Personal Ownership

The new term, "personal ownership," used in the Constitution, and the differences between the provisions of the Civil Code and those of the Constitution have posed a problem for the soviet jurists. Professor Goikhbarg, the compiler of the Civil Code, was the first to analyze the new concept of "personal ownership" and

of personal consumption; goods the sale of which is not forbidden by law; and all property not withdrawn from private commerce.

[23] 1 Civil Law Textbook (1938) 64; 1 Civil Law (1944) 124.

to contend that it is basically different from bourgeois private ownership, because it is essentially limited to ownership of articles of personal consumption and comfort.[24] This idea has been elaborated by other soviet writers.[25] Quotations from Marx, Engels, and Lenin are produced to show that the founders of communism had it in mind to draw a distinction between private ownership of instruments and means of production and individual ownership of consumers' goods (articles of consumption). The former must be abolished under socialism, and socialist ownership takes its place, while the latter remains.[26]

Ownership is now viewed by soviet jurists as a permanent institution of human society. But its form changes with change in the social structure. The question determining the type of a social organism is who are the owners and what do they own.[27] Socialist ownership of the instruments of production, say the soviet jurists, is the basis of the socialist society of Soviet Russia. Thus, there is no "capitalist" private ownership. But, "in the socialist society, socialist ownership of the instruments and means of production is combined with personal ownership by citizens of consumers' goods." [28]

[24] Goikhbarg, "Personal Ownership Under Socialism" (1937) Soviet Justice No. 10/11, 22 *passim;* Lenin, 24 Collected Works 365–8, 377.

[25] Orlovsky, "The Right of Personal Ownership Under Socialism" (in Russian 1937) Soviet Justice No. 20, 8; Godes, "Protection of Personal Ownership in the U.S.S.R." (in Russian 1938) *id.* No. 10, 4.

[26] "The situation which will be brought about by the expropriation of the expropriators is characterized here as a restoration of individual ownership but on the bases of public ownership of land and means of production produced by the labor . . . this means that public ownership shall extend to the land and other means of production, and individual ownership to products, in consequence, to consumption staples."
Marx and Engels, 14 Collective Works (Russian ed.) 130, quoted in 1 Civil Law Textbook (1938) 229, and 1 Civil Law (1944) 275.

[27] 1 Civil Law Textbook (1938) 162 *et seq.;* 1 Civil Law (1944) 221 *et seq.;* Zimeleva, Civil Law (1945) 59 *et seq.*

[28] 1 Civil Law Textbook (1938) 166.

Based upon socialist ownership, "personal ownership," the soviet jurists assert, is entirely different from private ownership in the capitalist world.[29]

Thus, the distinction between the means of production and consumers' goods is at present offered by the soviet jurists as a permanent guiding principle of the soviet "socialist" law of property. The boundary line for the sphere of private ownership in a socialist state is supposed to be drawn upon this principle, which thus harmoniously combines socialist with individual ownership. Some foreign legal writers have also adopted this line of thought.[30] However, this distinction is neither evidenced by early soviet confiscatory decrees, which certainly did not protect any ownership in consumers' goods,[31] nor is it consistently carried out in the present soviet law of property. The framers of the 1936 Constitution evidently sought to bar private ownership from the main economic resources and to restrict the property of a soviet citizen to what he personally can consume or use. However, the terminology used by them for this purpose, viz., instruments of production, consumers' goods, and articles of consumption is neither adequate, nor is it feasible to translate these purely economic con-

[29] *Id.* 165, 166: There is no longer any capitalist private ownership in the U.S.S.R. . . . Personal ownership taken as social relationship is inseparably connected with the public socialist ownership and derived from it. Such form of ownership is possible only in a socialist society.
See also 1 Civil Law (1944) 276 quoted *infra* at notes 40, 46.

[30] Hazard, "Soviet Property Law" (1945) Cornell L. Quar. 466. The author erroneously accepts the consumptive theory of soviet ownership as aboriginal. *Id.*, "Law, Individual and Property in the U.S.S.R." (1944) 9 Am. Soc. Rev. No. 3, 254; *id.*, "Soviet Domestic Policy in the Postwar World" (1946) 40 Am. Pol. Sci. Rev. 82, a good study.

[31] Confiscation of musical instruments (December 19, 1917, R.S.F.S.R. Laws 1917–1918, text 1020; August 24, 1919, *id.* 1919, text 415) and of dry goods under the government monopoly of dry goods (July 23, 1918, *id.* 1917–1918, text 599), certainly destroyed private ownership in consumers' goods. The same is true of the confiscations of agricultural products under various acts discussed in Chapter 1, p. 15–16 and Chapter 19, II.

cepts into legal definitions.[32] At least, this was not consistently done in the 1936 Constitution.

The principle that "private ownership of means of production shall be abolished" in the Soviet Union is declared in Section 4 of the Constitution, but other clauses admit exceptions. Thus, Section 7, paragraph 2, allows a peasant household in a collective farm to hold "in personal ownership auxiliary husbandry on its house-and-garden plot, a dwelling house, and such live-stock, other than draught animals, poultry, and minor agricultural implements, as are compatible with the charter of the collective farm." [33] Moreover, the admission of another type of private ownership of the means of production is implied in the provisions of Section 9 stating that "the law shall allow to farmers who are not members of collective farms and to handicraftsmen, small private husbandry based on their personal labor and excluding the exploitation of the labor of others." All these husbandries cannot exist without some means of production. Consequently, the Constitution suggests that four different types of ownership are allowed to individuals, in other words, that four types of private ownership exist in the Soviet Union. The social status of the owner determines the type of ownership allowed to him. One type of ownership is open to all citizens; another type is the ownership of collective farmers; a third the ownership of farmers who are not members

[32] The only traditional legal concept derived from the consumptive character of certain properties is that of fungibles (*res fungibiles*), i.e., things which are consumed (destroyed) by normal use, such as food and fuel. The soviet jurists recognize this concept (1 Civil Law (1944) 81), but it is obviously not identical with the concept of "consumers' goods" as a characteristic of objects of personal ownership.

[33] Standard Charter of an Agricultural Artel 1935, Section 4. The household may not own such property as is to be collectively owned under the charter, e.g., horses. See *supra*, Chapter 9, II, note 72, p. 345, see *infra*, pp. 713, 769.

of collective farms; and fourth is the ownership of the handicraftsmen. All these types of ownership are similar to the private ownership of the capitalist world in that they represent a right recognized to private persons. They are different from private ownership in the capitalist world as respects the limitation imposed in various degrees upon any type of ownership allowed to soviet citizens. Not only are certain species of property excluded from the ownership of individuals, but the powers embraced in their rights are also abridged.

5. Private Ownership in Soviet Law Evaluated

Ownership of handicraftsmen and farmers, nonmembers of collective farms, is the closest to normal private ownership. The textbook of 1938 refrained from giving it a legal characterization, being, like the Constitution, content to define its economic status as "small private business." The textbook of 1944 calls this private ownership with the addition of the adjective "toil," to emphasize that it may not be used for employment of hired labor. However, several other restrictions are imposed upon this ownership: the size of the tract of land allowed to a nonmember of a collective farm must not exceed 2.47 acres,[34] he has to pay a heavy progressive tax on horses owned,[35] he must supply twice as much meat as a household in a collective farm,[36] and the handicraftsmen are directly prohibited by special regulations from employing hired labor and are barred from certain trades.[37] Both have to pay heavier income

[34] U.S.S.R. Laws 1939, text 235, Section 4.
[35] Law of August 21, 1938, Vedomosti 1938, No. 11.
[36] U.S.S.R. Laws 1939, text 316.
[37] Rules concerning the issuance of licenses to traders and handicraftsmen of March 26, 1936, see *supra*, Chapter 9, II, p. 349 *et seq.*

tax and other taxes.[38] Otherwise, this economically unwelcome ownership lacks a well-defined legal status. The textbook of 1944 stresses that this type of ownership is not derived from socialist ownership and "with the gradual development of the latter is doomed to disappear altogether." [39] This may be true as far as the aim of the soviets goes, but it is equally true that this type of ownership goes beyond ownership in consumers' goods. This is also true of the ownership of a household in a collective farm which is coupled with some specific limitations as well. As the soviet textbook of 1944 explains:

> . . . In comparison with government ownership and that of collective farms and co-operatives, personal ownership may extend to a more limited group of objects. Only consumers' goods may be subject to the personal ownership of citizens, while the personal ownership of a household in a collective farm, alongside of consumers' goods, also includes some minor means and instruments of production, which must be used only by personal labor of the members of the household and may not become an instrument of exploitation of the labor of another.[40]

On the other hand, ownership allowed to citizens at large cannot be defined as ownership in consumers' goods or in articles of consumption. Provisions of Section 10 of the Constitution and of the statutes suppres-

[38] Under the Act of December 17, 1935, the independent handicraftsmen are subject to special taxes, U.S.S.R. Laws 1936, text 4; the Act of April 19, 1938, stated that it is inadmissible to place in taxation the nonmembers of collective farms on equal footing with the collective farmers, U.S.S.R. Laws 1938, text 117; the Law on agricultural tax of September 6, 1938, Vedomosti 1939, No. 32, established higher taxes for nonmembers of collective farms; the Law of August 21, 1938, Vedomosti 1938, No. 11, imposed a heavy progressive tax on horses owned by them; the Act of July 8, 1939, requires from them twice as much meat as from the collective farmers, U.S.S.R. Laws 1939, text 316; the Law of income tax of April 30, 1943, Vedomosti 1943, No. 17, subjects handicraftsmen to the heaviest rates, which are more than double those of the employees.

[39] 1 Civil Law (1944) 280.

[40] *Id.* 276.

sing private commerce precisely in these goods (see *supra*)[41] make it clear that the soviet law aims to protect only the ownership in articles of one's own consumption and personal use, and not in consumers' goods in general. Any acquisition of such goods in excess of one's own needs may result in confiscation and prosecution for speculation under Section 107 of the Criminal Code, which, as interpreted by the U.S.S.R. Supreme Court in 1940, includes the mere fact of buying up goods with the intention of selling them at a profit.[42] Moreover, the term "consumers' goods" is hardly fit to cover all the objects which individuals are allowed to own in the Soviet Union under Section 10 of the Constitution. This section reads:

> 10. The law shall protect the right of personal ownership by citizens in their earned income and their savings, dwelling houses, and auxiliary household economy, household effects and utensils, objects of personal consumption and comfort, as well as the right of succession in personal ownership of citizens.

The term "consumers' goods" certainly covers "household effects and utensils, objects of personal consumption and comfort." But "auxiliary household economy" and a "dwelling house" may be called consumers' goods only in a very loose sense. "Earned income and savings" are simply beyond the distinction between means of production and consumers' goods. It also should be borne in mind that "earned income" must cover winnings from government lotteries and bonds with prizes, interest on money deposited with governmental banks, Stalin's prizes, royalties of authors, and remuneration of inventors, since all these kinds of income are pro-

[41] U.S.S.R. Laws 1932, text 233, quoted *supra*, Chapter 9, pp. 341, 346.
[42] U.S.S.R. Supreme Court, Plenary Session, Ruling of February 10, 1940; Trainin and others, The R.S.F.S.R. Criminal Code (in Russian 1940) 134; Criminal Law, Special Part (Russian 3d ed. 1943) 350.

tected by soviet law and some of them are exempt from income tax.[43]

Generally speaking, the division of objects of property into instruments of production (producers' goods) and articles of consumption (consumers' goods) leaves out of sight objects connected with the services which cannot be, strictly speaking, identified either with production or consumption processes. The rendering of services is an essential element of economic life and things used in this connection, including various means of shipping, conveyance, and communication (horses, cars, boats, et cetera), are neither means of production nor articles of consumption. May, for example, one own a horse, taxicab, or a small ferryboat if personal ownership is limited to articles of consumption? Regarding horses the soviet law allows a farmer, nonmember of a collective farm, to own a horse but prohibits it to a collective farmer in grain-producing regions.[44]

All these inconsistencies and questions to which there is no answer, show that such terms as means of production, consumers' goods, and articles of consumption, indicate purely economic categories which do not cover all possible objects of ownership and are not well adapted, therefore, for legal constructions. Thus, the theory of ownership in consumers' goods offered as an explanation of the soviet "personal" ownership, is more a slogan of economic policy than an operative legal principle. The limitations imposed upon one or another type of ownership open to the soviet citizen are not governed by this principle but by scattered statutory provisions enacted at one time or another to suppress private business. At present, the dominant position of "socialist" ownership,

[43] See *supra*, Chapter 3, p. 96.
[44] See *supra*, note 33.

which is primarily government ownership, tends to suppress the ownership of individuals. The soviet law not only excludes certain objects from private ownership but also strips the legitimate private owner of rights and powers which form, under soviet statute, the Civil Code, the constitutive elements of ownership. Consequently, the ownership open to a soviet citizen appears to be not an absolute but a limited ownership. This was not denied by the earlier soviet writers,[45] but at present the soviet jurists attempt to present the limitations imposed upon private ownership not as limitations but as features of a new right *sui generis,* which is not germane to capitalist private ownership but is nevertheless a full right. They have come to realize the importance of ownership for soviet law and therefore do not wish to admit that the ownership of a soviet citizen is private ownership fenced in from many sides in a dark corner of the soviet legal system. Says the textbook of 1944:

> Personal ownership of a citizen or of a household in a collective farm is in principle opposed to private ownership. It is opposed not only to private ownership of instruments of production which serve as a means of exploitation, but also to private ownership in consumers' goods, insofar as the latter may always be transformed under capitalism into ownership of instruments of production and become a means of exploitation. Therefore, any attempt to see in personal ownership in the U.S.S.R. something equal to private ownership, is tantamount to a misrepresentation of the real nature of the former. The soviet legislation does not allow distortion of the contents of personal ownership by making use of it for the purpose of exploitation of the labor of another, directly or indirectly. The Decree of May 2, 1932, does not permit the opening of shops and stands by private merchants and prescribes the elimination by all means of middlemen and speculators who try to enrich themselves at the expense of the workers and peasants.[46]

[45] See *supra,* pp. 195, 221.
[46] 1 Civil Law (1944) 276.

This discussion furnishes a quite accurate picture of the limited economic functions of private ownership in the soviet socialist State, but, if judged from a legal standpoint, it proves the point stressed above, viz., that "personal" ownership, as thus outlined, is different from private ownership merely by its limitation. It appears a limited and not absolute ownership, even if measured by a yardstick taken from the soviet law. The soviet jurists accept the definition given in the soviet Civil Code, according to which ownership implies the right of the owner "to possess, to use, and to dispose of his property within the limits laid down by law."[47] From the analysis of the Constitution (see *supra*) and recent statutes, it follows that these limits are very narrow for the ownership open to individuals and affect all the powers of the owner. This is candidly admitted by the textbook of 1944 as follows:

> It would be a mistake to characterize the right of personal ownership as the right of the owner to make use of his property in his own discretion. It has been stated above that personal ownership *may not be used* as an instrument for exploitation of the labor of another. The owner *may not dispose* or *make use* of personal ownership in a manner opposite to the interests of the socialist economy. . . . It is also known that if the owner mismanages his property it may be taken away from him by the court and forfeited to the State.[48]

This shows clearly that "personal" ownership appears restricted not only as to the objects to which it may extend; it is also abridged in rights that under the soviet

[47] Civil Code, Section 58, see *supra* 1, also 1 Civil Law (1944) 227. By the right to possess is meant the right to hold the property. The right to use is the right of economical exploitation and of drawing all benefits from the property. The right to dispose of is the right to sell and otherwise convey the title, to hypothecate and establish other rights of third parties to the property.

[48] *Id.* 278. The specific instance of forfeiture of private property because of mismanagement by the owner, expressly provided for in the soviet statutes and referred to in the textbook, relates to buildings. See p. 589 *infra*.

law constitute elements of ownership. In other words, the constitutional clauses dealing with ownership and other pertinent statutory provisions have imposed further limitations upon private ownership beyond those established by the Civil Code. The "limits laid down by law" to the enjoyment of property by a private owner became narrower and less definite. "Personal" ownership is the name for such abridged and not absolute ownership as the soviet socialist State intends to allow to its citizens. The textbook of 1944 denies that the pertinent statutory provisions are limitations. It argues that:

> Essentially no limitation is imposed on ownership under the soviet law. . . . Respecting personal ownership, the question involved is not that of its limitation but of defining its content, preventing thereby its transformation to private ownership. Powers flowing from the right of ownership, viz., to possess, to use, and to dispose of a thing, are characteristic of all types of ownership in the U.S.S.R. But the content implied in these powers and the manner of their exercise vary depending upon the form (type) of ownership.[49]

But as is shown above, the variations of "the content implied in the powers," characteristic of the different types of soviet ownership, are degrees of limitation of such powers and their exercise. Thus, the soviet jurists simply evade calling a spade a spade. They prefer to call the limited powers, powers with a limited content.

Thus it may be concluded that the variety of limitations imposed at present upon private ownership in the Soviet Union cannot be well covered by one legal formula showing the new concept of ownership. This is perhaps the reason why the provisions of the Civil Code remained unchanged. The general concept of ownership carried over from traditional jurisprudence and

[49] *Id.* 227.

expounded in Sections 58–66 still holds ground, even in the setting of a socialist economy. The legal construction of ownership in general and its protection is still outlined in the recent soviet writings in accordance with the provisions of those sections. But when a nonsoviet jurist reads of ownership, he refers the term primarily to ownership by individuals, while the soviet jurist in such event has in mind primarily ownership by the government. For the former, private ownership means full right of absolute ownership without limitation implied; for the latter, the constitutional clauses and the provisions of the Civil Code establish such substantial limitations on private ownership as to make him determine cautiously whether and to what extent private ownership is permitted in a given instance. However, a nonsoviet jurist has difficulty in seeing in the provisions of soviet law dealing with private ownership anything but limitations on private ownership. In these limitations and in nothing else lies the real point of difference between the "legal nature" of soviet "personal" ownership and "private" ownership in nonsoviet countries.

The soviet law of property shows also how inescapable private ownership, although in a small dose, is, even in a socialist state. The concept of free absolute ownership, uniform for all owners, evolved towards the beginning of the nineteenth century as a reaction against the divided ownership in a feudal society, with its distinctions among types of ownership depending upon the social status of the owner and the various restrictions imposed. The variety of types of ownership under the soviet law also determined by the social status of the owner, bears close resemblance to the medieval situation. Legal constructions of medieval jurists who tried

to reconcile the feudal relations with the concept of ownership developed in Roman law may be helpful in the legal construction of ownership in the Soviet Union.[50] It may also be observed that the abolition of private ownership of land made it necessary to create substitutes for it in the form of the building tenancy, discussed *infra* under II in this chapter, and toil tenure, discussed in Chapters 19 through 21.

Soviet statutes concerning requisition (expropriation) and confiscation of property are discussed in the comment to Section 70 of the Civil Code (see Volume II, No. 2).

6. Protection of Property Under Criminal Law

The present privileged position of government property on the one hand, and the desire to show the soviet citizens that their personal property attained increased protection from theft were enhanced by two Statutes of June 4, 1947, introducing increased punishment for crimes against property.[51] In contradistinction to the Law of August 7, 1932 (see *supra*), the term socialist property is not used in the statutes. One statute deals with crimes against government property and public property, which this time is defined as "property of collective farms, co-operatives and other kinds of public property." Another statute deals with larceny and robbery of "property in individual ownership of citizens," apparently designating by this term any kind of ownership allowed to soviet citizens, including ownership of farmers and handicraftsmen and not only personal own-

[50] Compare *supra*, comment on socialist ownership, Chapter 11, p. 397.
[51] Vedomosti 1947, No. 19.

ership as defined in Section 10 of the Constitution (see *supra*).

Prior to these statutes, these crimes were dealt with in the Criminal Code, which provides, comparatively speaking, mild punishment for larceny, the lower bracket being imprisonment for a period not exceeding three months, or even forced labor without confinement for the same period. In specified instances the maximum term is one, two, or five years' imprisonment (Sections 162–165). The term for robbery does not exceed five years, or in case of armed robbery, ten years of imprisonment, but if there are especially aggravating circumstances, the death penalty may apply (Section 167).

With the exception of embezzlement in office, the Criminal Code does not make any particular distinction between the theft of private, government, or public property. However, as was mentioned elsewhere, under the Law of August 7, 1932, which does not seem to be affected by the new statutes, any misappropriation (pillage) of goods shipped by rail or water, government property, or property of collective farms and co-operatives, was made punishable by death (since the Law of May 26, 1947, by confinement in a camp of correctional labor for twenty-five years), or under extenuating circumstances, by confinement for ten years with confiscation of property. The Statutes of June 4, 1947, increase considerably the penalty for larceny and robbery of private property, but increase even more the penalty for crimes against government and public property.

Regarding private property, a heavier punishment than before is enacted for larceny (defined as concealed or open asportation) and for robbery. The punishment

is confinement in a camp of correctional labor for larceny, for a period of from five to six years, or if committed for the second time or by a band of thieves, for a period of from six to ten years; for robbery the term is from ten to fifteen years, or from fifteen to twenty years if it was coupled with violence dangerous to life and health or similar threats. Robbery is punished, in addition, by confiscation of property. Embezzlement and misappropriation of private property is not affected by the new statute.

Regarding both governmental property and public property, new, heavier penalties are established not only for larceny but also "for misappropriation, embezzlement or any other kind of theft." The minimal penalty for such crimes against government property is confinement in a camp of correctional labor for a period of from seven to ten years with or without confiscation of property, or from ten to twenty-five years if committed for the second time, by a band, or on a large scale. The terms of confinement in case of theft of public property are, respectively, from five to eight years and from eight to twenty years. Failure to report to public authorities a committed or prepared robbery of private property, is punished by imprisonment for a period of from two to three years or by exile for a period of from four to five years. Failure to report a committed or prepared theft of governmental or public property when it is committed for the second time, by a band, or on a large scale, is punished by confinement for a period of from two to three years or by exile for a period of from five to seven years.

Consequently, an embezzlement of private property is still punishable under the Criminal Code (Section

168) by imprisonment for a period not exceeding two years, while a similar act against public property entails confinement in a camp of correctional labor for from five to twenty years and of government property from seven to twenty-five years. The statutes introduce a new classification of property slightly different from that provided for by the Constitution. The term "personal ownership" is used in a broader sense and "public property" in a narrower sense. There is no material available to judge whether this classification will also be used in private law.

II. Building Tenancy

1. Preliminary

Building tenancy, under soviet law, was intended to supply a substitute for private ownership of land in urban and suburban settlements. It was an attempt to combine government monopoly of the ownership of land, including the ground under any privately owned house, with private ownership limited to the house or other buildings thereon. The pattern for this innovation was found in the institution known in Roman law as *superficies* and *emphyteusis*, a contract in the nature of a perpetual lease by which the owner of uncultivated land granted it to another, either in perpetuity or for a long time, on condition that he should improve it by building. The tenant had the right to alienate and hypothecate his interest, or transmit it by descent to his heirs, subject to payment of annual rent but on condition that the grantor should never re-enter so long as the rent was paid.[52]

This institution was revived in modern European

[52] Inst. 3, 24, 3; Dig. 43, 18, 1.

legislation for the development of cities. It may be compared with the ground rent in Pennsylvania. The German Code introduced it under the name of *Erbbaurecht* (hereditary building right).[53] A similar provision was made by the imperial Russian Law of June 23, 1912.[54] This law introduced the new Russian term for the right, *pravo zastroiki,* and defined the concept, which was subsequently adopted by the soviet Civil Code. Although the imperial law extended the possibility of such grants to any owner of any land, nevertheless, the primary purpose of the law was to empower public bodies, such as villages, cities, religious institutions, government departments managing public lands, et cetera, to promote the construction of dwellings by private persons, at the same time retaining the title to the land. The situation was very much the same as that which arose under the soviet regime, and the compilers of the soviet Code borrowed extensively from the old law. However, they failed to express the essence of the institution in a short statement.

2. Building Tenancy Under Imperial Law

Thus, the definition given in the imperial Code of Laws, Volume X, Part 1 [1], which, so to speak, formed their background, may well be used as an introduction to the study of the soviet provisions:

542 [1]. The owner of a plot of land may grant to another person the right of building on it, under a contract for a term and compensation provided for in the contract, in accordance with the rules set forth in the following sections.

[53] BGB, Arts. 1012–1017. See also Swiss Code, Section 675, German Law of 1919 and Austrian Law of 1912.

[54] Collection of Imperial Laws, 1912, text 1147, incorporated as Sections 542 [1-27] of the Civil Laws, Vol. X, Part 1 of the General Code of Laws—Svod Zakonov (1914 ed.).

542 [2] The right established under Section 542 [1], called building tenancy, descends by inheritance and during its duration may be conveyed by free agreement or by public sale, disposed of by will and hypothecated for debts, as well as, in the absence of a provision of the contract to the contrary, subjected to easements (servitudes), in accordance with the provisions set forth for immovables.

542 [3] A building tenancy may be established by agreement of the parties for the duration of not less than *thirty-six* and not more than *ninety-nine* years.

542 [18] A building tenancy shall terminate: (a) by expiration of the term; (b) if the grantee becomes the owner of the lot or vice versa.

3. Original Provisions of the Civil Code

Under the soviet law the lots for building tenancy are given under a contract by the municipal government or the rural soviets for a specified period not to exceed fifty years if a wooden building is erected, and not to exceed sixty-five years if a stone or concrete building, and not over sixty years for a mixed building.[55] The building tenancy was designed to be the only legal device by means of which a new house might be built privately, or capital repair, alteration, or furnishing of an old house, made by a private person.[56] Privately owned housing was intended to be limited only to those small houses which survived from the prerevolutionary days (see Chapter 8, IV, 1). Expansion of private housing was allowed only in the form of building tenancy under which the lot together with the house was to revert to the State upon the expiration of the term for which the contract was made. In creating the building tenancy and granting to it some privileges specified below, the aim of the government was, according to the soviet writ-

[55] Civil Code, Section 71.
[56] *Id.*, Section 84; also 1 Civil Law (1944) 284.

ers, to stimulate citizens to invest their savings in the construction of houses for themselves and even to induce private capital to become engaged in the erecting of apartment houses.[57] A special law was enacted to create attractive conditions for such an investment.[58] Nowhere is it stated in the Code that building tenancy may be obtained exclusively for the erection of one's own residence. The statutory provisions mention merely "erection of building" without specifying the nature thereof. Thus, the erection of a building under a building tenancy for other than residential purposes is not in conflict with the letter of the provisions of the soviet Civil Code. Moreover, until 1932, the tracts of land needed for the erection of new buildings by government agencies, including trading quasi corporations, and by co-operatives, were also assigned to them under building tenancy contracts made with the pertinent government office controlling the given tract of land. Thus, building tenancy seemed to acquire the nature of a universal substitute for urban landed property.

Furthermore, in comparison with the private owners of small houses which survived from the prerevolutionary times, the building tenants enjoyed several privileges up to 1937. Thus, holders of houses erected under building tenancies were permitted: (a) to collect from their tenants rent without limitation otherwise established under the soviet law; (b) to collect in addition to periodic payments, lump sums at the time of leasing (so-called admission or entrance payment); (c) to rent premises without being bound by general standards establishing per capita square surface size; (d) to evict tenants after the expiration of the term of lease; (e)

[57] 1 Civil Law (1944) 283.
[58] R.S.F.S.R. Laws 1928, text 759; U.S.S.R. Laws 1928, texts 4, 231, 545.

to choose their tenants, not being subject to orders by housing authorities.[59] Furthermore, limitation on the accumulation of privately owned premises by prohibition of the acquisition of more than one such house in the same family (Civil Code, Section 182) is not applicable to building tenancies.

4. Recent Trends

However, bit by bit, the above features of building tenancy and the wide range of its application have been substantially modified. As a result, building tenancy appears at present in a new light and is treated differently by the soviet jurists than under the New Economic Policy. In the first place, the assignment of lots to government agencies under building tenancy contracts was discontinued in 1932. In that year it was enacted that government agencies of any kind shall be assigned building lots not under a building tenancy limited by a period of time but for use without time limit. The co-operatives were given a choice between such assignments and building tenancies and the co-operatives seldom selected the latter.[60] Thus, building tenancy became in fact restricted to the assignment of land to private persons.

Again, under the general policy of barring of private enterprise, any investment of private capital in housing for the purpose of profit was barred. The 1936 Constitution does not mention building tenancy and promises protection of ownership in a house used by the

[59] Act of October 16, 1924, R.S.F.S.R. Laws 1924, text 785; Acts of April 6 and July 30, 1928, *id.*, texts 355, 727; Act of June 6, 1925, *id.* 1925. text 305; Act of November 20, 1932, *id.* 1932, text 396; Act of December 13, 1926, *id.* 1927, text 2.

[60] R.S.F.S.R. Laws 1932, texts 295, 396; Ukrainian Civil Code, Sections 84^{1}–84^{6}.

owner for his own dwelling only. In 1937, the major privileges of the building tenants, regarding the renting of premises in their houses and the law sponsoring the erection of apartment houses by private capital, were repealed.[61] The building tenants may not erect houses just in order to rent them but primarily for their own residence. If they happen to have extra space in their residence house, they may not charge more than 20 per cent in excess of ceiling rent and may not collect any admittance payment in addition to the rent. They may not evict tenants upon the expiration of the lease. Thus modified, building tenancy came closer to private ownership of a house, the main difference between the two being the period of time by which the tenancy is limited under the contract.[62] The obtaining of a lot under a building tenancy is not a matter of right but of discretion of the office of the municipality or other local government disposing of the lot. Such agencies, therefore, may be instructed by an administrative order to refuse the making of contracts wherever the applicant has his own house or another tenancy, in other words, when he does not need the new building for his own dwelling, and thereby the building tenancies may be brought under the other restrictions established for privately owned houses.

The above modifications are reflected in the definitions of building tenancy given by the soviet jurists. Thus, the textbook of 1938 still defined building tenancy in broad terms, as follows:

[61] U.S.S.R. Laws 1937, text 314, Section 35. The corresponding sections of the Civil Code, viz., Sections 155, Notes, 156 and Notes 1–3, 156-b, 156-c, 166 and Note, 169, Notes 1 and 2, 173, were amended or abolished by the R.S.F.S.R. Act of June 24, 1938 (R.S.F.S.R. Laws 1938, text 163).

[62] Vilniansky, "Building Tenancy" (in Russian 1940) Transactions (Uchenye Zapiski) of the Kharkov Law Institute No. 2, 13; also 1 Civil Law (1944) 282; Zimeleva, Civil Law (1945) 91.

Building tenancy is a right to hold a plot of land for the purpose of erecting a building, which right is coupled with the right to possess, to use, and to dispose of the erected building within the period of time stipulated by the contract of building tenancy.[63]

But the 1944 textbook definitely stressed that the lot granted under a building tenancy must be used for the erection of a "dwelling house."

Building tenancy is an alienable right in rem to use a plot of land for the purpose of erecting upon it a dwelling structure and to use, to possess and to dispose of such structure. . . . Building tenancy may be alienated and mortgaged. Building tenancy is subject to inheritance.[64]

Building tenancy is no longer the only legal basis for the erection of new private housing. There is a tendency to assign new lots primarily for the erection of privately owned houses. Thus, the rules of 1939 concerning loans for erection of houses by employees, i.e., the bulk of the soviet population, with or without aid from the employing government enterprise, prescribed that houses so erected shall constitute personal ownership and not a building tenancy of the persons concerned.[65] In view of the above modifications in the status of building tenancy, opinion was voiced among the soviet jurists for the reform of building tenancy and for making the present building tenants outright owners of the houses erected by them.[66] Thus, building tenancy is about to give

[63] 1 Civil Law Textbook (1938) 241.

[64] 1 Civil Law (1944) 282.

[65] U.S.S.R. Laws 1939, text 188, also *id.* 1937, text 314, Section 7; *id.* 1936, text 343.

The Act of May 22, 1944, promoting construction of housing by individuals in the regions once occupied by the Germans, requires the local authorities to assign lots to individuals but does not limit such assignment to any period of time specified for building tenancies. U.S.S.R. Laws 1944, text 109; Polianskaia, Land Law (in Russian 1947) 97.

[66] Vilniansky, *op. cit.*, note 62; 1 Civil Law (1944) 284.

way to ownership,—the very institution it was designed to replace. On the other hand, on the eve of the war strict measures were ordered to check unauthorized erection of buildings by private persons, that is, construction not provided by the general government plan. Houses so erected were threatened with demolition.[67] But after the war the grant of lots for the erection of houses in private ownership was used as a means to reward groups of individuals for their services and also to create more attractive conditions for executives and workers transferred to Ural, Siberia, and the Far East. Thus, under several acts of 1945 and 1946, members of the Academy of Sciences may be assigned lots for building suburban cottages (*dacha*), and generals, admirals, and senior officers who retired after twenty-five years of service, as well as personnel of factories in the Ural region, Siberia and the Far East, may be assigned lots for building houses which will be privately owned by them.[68]

III. Government Ownership of Ownerless Property

1. Preliminary

It is a particular feature of the soviet law of property that "ownerless property, that is, property whose owner is unknown or which has no owner, reverts to the ownership of the State" (Civil Code, Section 68). The

[67] R.S.F.S.R. Act of May 22, 1940, R.S.F.S.R. Laws 1940, text 48.

[68] The author was not able to locate these acts in any official collection of soviet law, but they are referred to by Lipetsker, "Legal Nature of Building Tenancy" (in Russian 1947) Socialist Legality No. 3, 64, and Braude, Housing Cases (in Russian 1946) 13. Concerning members of the academy, see Resolutions of the Council of People's Commissars of March 10, 1946, concerning generals, admirals, and senior officers, *id.* of June 21, (July 21), 1945 No. 1466, and concerning employees in the Ural, Siberia and the Far East, see the act printed in Izvestiia, August 27, 1946.

R.S.F.S.R. Supreme Court, in interpreting this section, established the presumption of government ownership of any disputed property in the Soviet Union, until the contrary is proven. Whoever claims property must prove that it belongs to him and not to the State.[69] The early soviet writers referred to this ruling with pride, as an example of the active role of the soviet court in the creation of a socialist law. But in the recent annotated editions of the Civil Code, that particular passage is omitted from the ruling, and the 1938 textbook considers it obsolete.[70] Nevertheless, the following comments of the textbook of 1944 show that the right of the State to property whose owner cannot be identified still enjoys a broad construction:

> Under the soviet law, there are no things which do not belong to someone in ownership and are therefore open to occupation. Everything which is not owned by organizations and individuals constitutes the property of the soviet State. . . . Under the capitalist laws, ownerless property may become property of individuals, but under the soviet law it becomes the property of the State. Of course, the State may grant organizations or individuals the right to acquire certain property through occupation (e.g., collection of discarded things, rugs, or scrap). By way of exception from the general rule, ownerless property in rural localities is given free of charge to mutual aid societies of collective farms or village soviets, with the exception, however, of farm buildings, machines, agricultural implements, animals of any kind, agricultural products, valuables and money (Statute on Procedure of Recording and Utilization of the Nationalized, Confiscated, Escheat and Ownerless Property of April 17, 1943, U.S.S.R. Laws 1943, text 98).[71]

Thus, wild beasts, birds, fishes, and the like are gov-

[69] R.S.F.S.R. Supreme Court, Plenary Session of June 22, 1925, Civil Code (1941) 148.

[70] 1 Civil Law Textbook (1938) 173. The part of the ruling containing such statement was omitted from the 1943 edition of the Civil Code, 152.

[71] 1 Civil Law (1944) 232.

ernment property.[72] Individuals may acquire them through occupation by virtue of a statute or an administrative license (for hunting and the like). Fishing for one's own consumption is open to anyone under compliance with special rules.[73]

2. Ownerless, Neglected, and Mismanaged Property

Special regulations were issued regarding the procedure of transfer of ownerless property to the government.[74] They apply, in fact, only to privately owned houses (see *supra* II, and Chapter 8, IV). By these regulations, a distinction is drawn between ownerless property and neglected property. A building whose owner is unknown or which is in escheat after the owner died, was declared dead or an absentee under Section 12 of the Civil Code, is considered technically ownerless. Such property reverts to the State on administrative order of local authorities. But if the whereabouts of an absent owner is known and he merely does not take care of his property, the property is technically called neglected. In order to secure forfeiture, the local soviets must sue in court. If the owner has renounced his building, it is assigned to the communal fund by the administrative authorities.[75] The soviet law provides also for the possibility of a forfeiture of a building which

[72] Game Law of February 10, 1930, Section 1, R.S.F.S.R. Laws 1930, text 109, also U.S.S.R. Laws 1936, text 56.

[73] U.S.S.R. Laws 1935, text 420; 1 Civil Law (1944) 231.

[74] R.S.F.S.R. Supreme Court, Presidium, Ruling of August 14/15, 1934, Protocol No. 34, Civil Code (1943) 167; Joint Circular Letter of the R.S.F.S.R. Commissars for Justice and Municipal Economy of October 22, 1935, No. 128/227, Civil Code (1943) 168–170. For translation see Vol. II, No. 2, comment to Section 68.

[75] Renunciation does not require notarization. R.S.F.S.R. Supreme Court, Plenary Session, Protocol No. 13, September 26, 1930, Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 1935) 51; 1 Civil Law (1944) 231.

is neither ownerless nor neglected in the above sense, but is "mismanaged," i.e., the owner is not absent but fails to keep it in good repair.[76] Before the forfeiture, the municipal government must notify the owner requesting him to make repairs within a fixed period of time. In case of failure to comply with the request, the municipal government must file a suit with the court, which declares the building forfeited unless it finds that the owner neglected the repairs without fault.

It may also be mentioned that adverse possession is not recognized by soviet law. The original owner is barred from action against the adverse possessor by a lapse of three years, but the latter does not thereby acquire a title. The property, according to the soviet jurists, becomes ownerless and therefore reverts to the State.[77] However, no examples of adjudication on this ground are given in the soviet writings.

IV. Find and Treasure-Trove

Distinction is made under the soviet law between a find and a treasure-trove. The find is regulated by Sections 68*a et seq.* of the Civil Code and the treasure-trove by the Acts of January 3, 1930[78] and April 17, 1943.[79] Neither the finder of lost property, nor the discoverer of a treasure-trove or the owner of property (e.g., land) on which the trove was concealed, may become owners thereof. The government is the owner of all treasure-troves and of all finds whose owners did not

[76] Directive of the R.S.F.S.R. Commissar for Justice of October 23, 1923. No. 226 (1923) Soviet Justice No. 42, and the Ruling of the R.S.F.S.R. Supreme Court of July 6, 1930 (1930) Judicial Practice No. 9; 1 Civil Law (1944) 239.

[77] 1 Civil Law (1944) 229.

[78] U.S.S.R. Laws 1930, text 48.

[79] U.S.S.R. Laws 1943, text 98.

appear within a specified period of time after the publication. One who finds a lost property or discovers a treasure-trove must surrender it to authorities and is then entitled to remuneration, which is 25 per cent for the treasure-trove[80] and 20 per cent for a find. Treasure-trove is defined as valuables, such as precious stones and precious metals in any form, prerevolutionary gold or silver coins, foreign exchange, or soviet currency buried in the ground or otherwise concealed, the owner of which is unknown or has lost his right to the treasure-trove. Thus, in contrast to a find, a treasure-trove consists of certain valuables, it is concealed and not simply lost, and its owner is unknown. Therefore, if one finds some valuables concealed by its known owner, there is neither a find, because property was not lost, nor a treasure-trove, because the owner is known. In such instances, the owner retains all his rights and the finder is not entitled to any remuneration.

If the owner of lost property appears and claims it, he has to pay the remuneration to the finder, but the court may reduce it or absolve the owner altogether (Section 68*c*). If he does not appear, the State, as the owner of unclaimed lost property and of all treasure-trove, retains the property and pays the remuneration.[81] No remuneration is paid for property lost and found "in offices, business premises, premises open to general use, rolling stock of railroads, steamships, and the like" (Section 68*f*). Failure to surrender the find or the treasure-trove entails a penalty for misappropriation (Section 168 of the Criminal Code).

Under the imperial law, treasure-trove, defined as

[80] *Id.*, Section 9.

[81] The details of procedure of payment are given in the Circular Letter of the People's Commissariat for Finance of August 1, 1934, No. 458.

"treasures buried in the ground," belonged to the owner without whose permission "not only private persons but also the local authorities may not search for it." [82]

V. Patent Law

1. Preliminary

The particular feature of the soviet legislation concerning inventions involves two basic principles common to the patent law of all other countries of the world. Outside the Soviet Union the inventor may take out a patent for his invention and acquire thereby what the United States statute defines as "the exclusive right to make, use, and vend the invention." [83] Again, invention is not merely an improvement, and its novelty is an essential requirement which constitutes the foundation of the right to obtain a patent.[84] It is true that in various countries different periods of time for the duration of exclusive right are fixed; in some instances license to use the patented invention may be issued by the government against the will of the patent holder,[85] and slightly diversified criteria are set up defining what is and what is not an invention, as well as for the determination of novelty.[86] Nevertheless, the above-mentioned two essential elements are generally recognized by the patent laws of all countries.

The attitude of soviet law to these major issues of patent law has varied in different periods of the soviet regime. Nationalization of inventions was declared by

[82] In the provinces of Poltava and Chernigov a treasure-trove found by chance on the grounds of another belonged half and half to the owner and the finder (Svod Zakonov, Vol. X, Part 1, Sections 537–540, 430).
[83] Revised Statutes, Section 4884, 35 U.S.C.A. Section 40.
[84] Compare Dunbar v. Myer, 94 U. S. 187, 24 L. ed. 34.
[85] E.g., German Law of 1891, Section 11; Law of 1936, Sections 8, 15.
[86] For comparison, see Toulmin, Invention and the Law (1936) 6 *et seq.*

the Decree of June 30, 1919,[87] but the decree mentioned remuneration to the inventor. With the advent of the New Economic Policy, a new patent law was enacted on September 12, 1924,[88] framed on the pattern of the German law and affording the patent holder an exclusive right similar to that in capitalist countries. With the socialist reconstruction, an entirely new law was enacted on April 9, 1931,[89] which in some sections was modified on July 22, 1936, and was replaced by the Statute of March 5, 1941,[90] and the Instruction of November 27, 1942,[91] affording substantial implementation of its provisions. These two acts now embody the patent law of Soviet Russia and develop in greater detail basic principles first stated in the statute of 1931. These are as follows.

2. Patents Under the Soviet Law

The soviet statute provides for two methods by which the inventor may profit by his invention. One is the survival of provisions of the period of the New Economic Policy when private industrial enterprise was tolerated. The inventor may take out a patent and acquire thereby the exclusive right to his invention. Such patent, though restricted in some respects, is comparable to patents in capitalist countries. Patents are issued for fifteen years, counting from the date when patent application is filed, and during this period no one may use the patent without the consent of the patent holder who may utilize it at his discretion within the

[87] R.S.F.S.R. Law 1919, text 341.
[88] U.S.S.R. Laws 1924, text 97.
[89] *Id.* 1931, texts 180, 181; *id.* 1936, text 334.
[90] *Id.* 1941, text 150. For translation see Vol. II, No. 25.
[91] *Id.* 1942, text 178. For translation see Vol. II, No. 26.

Soviet Union.[92] Although authorized to issue licenses for the use of the patent,[93] he may not, however, assign the use of the patent abroad, nor may he take out a patent abroad for an invention made in the U.S.S.R., without a permit of the Council of Ministers, under a penalty which is especially heavy if the invention is useful for national defense.[94] If the invention is of special importance to the State and no agreement is reached between the ministry concerned and the patent owner concerning the assignment of the use of the patented invention, the U.S.S.R. Council of Ministers may decree a mandatory transfer of the patent or may order the issuance of a license for the use of the invention by the agency concerned and fix the amount of remuneration for the inventor.[95]

3. Certificate of Authorship

Another method offering benefit to the inventor is designed to fit the present soviet economic system of government monopoly for industry and to combine the actual monopoly in fact exercised by the soviet government over inventions made by soviet citizens, with some stimulating advantages for the inventors. The inventor may take out, instead of a patent, the so-called certificate of authorship.[96] This automatically vests in the soviet government the exclusive right to the invention, but the inventor obtains, in exchange, a right to receive remu-

[92] Statute of 1941, U.S.S.R. Laws 1941, text 150, Sections 1, 4.

[93] *Id.*, Section 4.

[94] *Id.*, Section 67. R.S.F.S.R. Criminal Code, sections quoted in Vol. II, No. 25, Section 67, comment. Also the Edict of June 9, 1947, Section 6, Vedomosti No. 20. For translation, see Vol. II, No. 51.

[95] *Id.*, Section 4, subsection (d).

[96] *Id.*, Section 1.

neration in accordance with a schedule,[97] together with some other privileges,[98] and his name shall be given to the invention.[99] But such certificate of authorship may be issued not only for what constitutes, technically speaking, an invention which meets the requirement of novelty, but also for some improvements which do not come within the meaning of an invention. An invention is conceived in the main along the traditional lines,[100] but the improvements for which a certificate of authorship may also be issued are different. Two types of improvements are distinguished: (a) "suggestions for technical improvements," defined as suggestions that improve construction or technological processes used in a given enterprise or production unit, and (b) "suggestions for rationalization" which, without essential change in construction or technological processes, improve production techniques or processes by means of more effective use of equipment, materials, or manpower.[101] All three, i.e., inventions and both types of improvement, are remunerated as a rule, depending upon the saving obtained, according to a schedule, but for inventions the rates are higher and the normal maximum is 100,000 rubles, for technical improvements the maximum is 50,000 rubles, and for rationalization of procedure it is 25,000 rubles.[102]

[97] *Id.*, Section 3, 69; Instruction of 1942, Section 9.
[98] *Id.*, Sections 3, 70, 71, 72.
[99] *Id.*, Section 3, par. 4.
[100] *Id.*, Section 25, par. 4; Sections 29, 30, 33 definitely require novelty for an invention.
[101] Instruction of November 27, 1942, U.S.S.R. Laws 1942, text 178, Section 1.
[102] *Id.*, table appended to Section 9.

4. Invention and Technical Improvements

The textbook of 1944 [103] explains the difference between invention and technical improvement as follows:

If a suggestion is of a technico-constructive nature (e.g., new construction of a machine) or one which alters the technological side of the production process and is a novelty from the point of view of world technique, it is considered an invention. But if the suggestion offers a solution to a technical problem that appears new only for the given establishment or a certain phase of production under the actual condition of its technical progress, it is a technical improvement. An invention is essentially a new solution of a technical task resulting in raising the level of the world technique. A technical improvement is achieved by means already known to science and technology. Therefore, a technical improvement may not be original, which is inadmissible for an invention.

Because a technical improvement is of importance only for a given establishment or a given phase of production, it is protected, as the U.S.S.R. Supreme Court has ruled, within strictly local limits, depending upon the office with which its author filed the suggestion. Therefore, if several persons independently of each other suggested the same technical improvement to various establishments, then each such person is considered the author and enjoys the right to a corresponding remuneration (Rulings of the Civil Division of the U.S.S.R. Supreme Court of November 4, 1939 and March 4, 1940).[104]

5. Advantages Under the Certificate of Authorship

Several provisions seek to discourage the taking out of patents, and certain types of inventions are altogether closed for patents though they are open to certificates of authorship. Thus, the first 10,000 rubles of remuneration obtained under the certificate are exempt from

[103] 2 Civil Law (1944) 258, 259.

[104] *Id.;* also Collection of Rulings of the U.S.S.R. Supreme Court . . . for the second half year of 1939 and the first half year of 1940 (in Russian) 289.

income tax,[105] and the certificate holders have priority for promotion and appointment for better jobs.[106] Any patent holder is expressly deprived of these privileges.[107] If an inventor holds a patent and then takes out a certificate of authorship for another invention, he may not enjoy the privileges connected with the latter.[108] He as well as his heirs, however, may convert the patent into a certificate at any time, provided they have not issued a license for the use of the patent.[109] While the certificate is issued gratuitously, the application for a patent is subject to a special fee.[110] Furthermore, the novelty and authorship of an invention for which a certificate of authorship was issued may be contested by third parties only within one year from the issuance.[111] But a patent is contestable during the entire fifteen year period when it is in effect, if the objection is raised on the ground that the invention lacked novelty or was subject to a certificate of authorship and not a patent.[112] No specific period of limitation is prescribed for contesting the authorship of a patented invention.

If the invention has been made in an enterprise, institution, or organization for scientific research, and was developed by the inventor by assignment from such body, the certificate of authorship is issued in the name of the actual inventor with an indication of the enterprise or organization in which the invention was de-

105 *Lex cit.*, note 90, Section 70 and Section 4, subsection (e).

106 *Id.*, Section 72.

107 *Id.*, Section 4, subsection (e).

108 *Id.*, Section 8.

109 *Id.*, Section 7.

110 *Id.*, Section 4. subsection (f).

111 *Id.*, Section 38. Dispute as to novelty is determined by the Bureau of Inventions, the dispute over authorship by the court.

112 *Id.*, Section 45. No particular period of time is set up for the filing of a suit contesting the authorship of a patented invention. 2 Civil Law (1944) 266 thinks that the same period of one year as for certificate of authorship is applicable.

veloped.[113] For inventions which result from collective experiences and practice and not from the personal initiative of the inventor or a group of inventors, a certificate of authorship but not a patent may be issued in the name of the bureau, laboratory, institution, or enterprise.[114]

Generally, either a patent or a certificate may be issued only for such inventions as may be utilized for industrial purposes, including transportation and agriculture.[115] Chemical substances are not patentable; a patent or a certificate of authorship may be issued only for methods of preparing such substances. Moreover, certain inventions may be the subject matter of a certificate of authorship only, and not of a patent. Thus, medicine, foodstuffs and flavorings obtained by non-chemical processes, new kinds of seeds, and methods of treating a disease, are not patentable, though a certificate of authorship may be issued for them. However, a patent may be issued for methods of preparation of medicine, foodstuffs, and flavorings.[116] No patent but only a certificate of authorship may be issued, (a) if the invention is made in connection with the work of the inventor in institutions for scientific research, in construction bureaus, in experimental shops, laboratories, and other institutions and enterprises; (b) if the invention is made by commission of a government agency, a co-operative, or a public organization; (c) if the inventor has received pecuniary or other material aid from the government or a co-operative or public organi-

[113] *Id.*, Section 37.

[114] *Id.*, Section 37, Note.

[115] *Id.* 2, par. 2; 2 Civil Law (1944) 257. Devices for visual methods of school instruction and school equipment are subject to certificate of authorship but not patents, Act of May 10, 1939. U.S.S.R. Laws 1939, text 215.

[116] *Id.*, Section 2.

zation, for the purpose of development of the invention.[117] In view of the absence of any private research institutions and of any private industrial enterprise of any consequence, the above stated conditions excluding the issue of a patent do, in fact, cover the typical soviet environment of work of an inventor.

6. *De Facto* Government Monopoly Over Inventions

Thus, the present soviet legislation is closer to the first decree of 1919, which declared the nationalization of inventions and offered the inventor remuneration instead of exclusive right, than to the patent laws of the days of the New Economic Policy. But in contrast to 1919, the inventor is not at present deprived outright of obtaining a patent and the exclusive right connected with it. However, the statute attaches important advantages to the other method, the mere certification of invention, inducing the inventor thereby to surrender voluntarily his invention to the government and offering certain benefits in exchange. The inventor is also induced to prefer a certificate to a patent by the fact that suppression of private industry leaves very little room, if any, for private exploitation of an invention of any technical consequence. Moreover, the intended monopoly of the soviet State over the inventions of soviet citizens transpires from the provision prohibiting soviet citizens from patenting abroad inventions made by them within the boundaries of the Soviet Union.[118] Likewise, soviet nationals sent abroad in the employment of their government may not there take out patents even for inventions made abroad, unless a permit is granted by the Council of Ministers.

[117] *Id.*, Section 5.
[118] *Id.*, Section 67.

7. Remuneration of the Inventor

A particular feature of the remuneration accorded under a certificate of authorship is that its amount is determined by a schedule and does not, as a rule, exceed certain limits. This limit was set up in a way illustrative of the soviet legislative technique. Nothing in the statute of 1941 warrants the establishment of such a limit. It provides that the remuneration for an invention or technical improvement depends "upon the technical significance, savings, and other effects flowing from the invention or technical improvement to the national economy, as well as upon the degree of development thereof," the amount to be determined under an instruction to be approved by the Council of People's Commissars (now Ministers).[119] Now the instruction so approved on November 27, 1942, states bluntly that the amount of remuneration "shall be determined depending upon the annual savings obtained through application" of the invention or improvement and refers to the appended table.[120] The table, however, definitely states that remuneration for an invention should not exceed 100,000 rubles, for a technical improvement 50,000 rubles, and for a suggestion for rationalization of procedures 25,000 rubles. In certain specified instances the remuneration may be increased by 100 per cent or even 300 per cent.[121] Complex provisions regulate the method of calculation of the amount of savings received through the application of an invention or improvement.[122] However, if no saving is realized and the invention or improvement results in better quality of production, or improvement

[119] *Id.*, Section 69.
[120] Instruction cited *supra*, note 91, Section 9.
[121] *Id.*, Sections 12, 13.
[122] *Id.*, Section 14 *et seq.*

of labor conditions or safety, the amount of remuneration is determined by the head of the government enterprise which accepts the suggestion.[123] Any remuneration may be increased by from 10 to 30 per cent depending upon the perfection of presentation (sketches, blueprints, models, et cetera).

Although there is a special Central Bureau of Invention attached to the State Planning Committee, patents and certificates of authorship are issued by the central federal government departments [124] and some government departments of the constituent republics.[125] Each department issues the patents and certificates involving inventions and improvements applicable in industries under its jurisdiction. The Bureau of Invention functions primarily as a body for keeping a central record of inventions and for publication of patents, and it decides also on the issue of novelty.[126] The determination of remuneration is entirely within the jurisdiction of the government department which issues the certificate.[127]

8. General Characteristics: Interests of the Inventor

In view of all the provisions concerning the issuance of patents and certificates of authorship, the characteristic feature of the soviet law is that it gives the inventor only one advantage over the originator of a technical improvement, viz., a right to a higher remuneration. However, in both instances the amount of remuneration

[123] *Id.*, Section 11.

[124] *Lex cit.*, note 90, Section 15: U.S.S.R. ministries, central bureaus, and committees attached to the U.S.S.R. Council of Ministers; Tsentrosoyooz, the Central Council of Co-operatives.

[125] *Id.:* Ministries of local industry, municipal economy, and education of the constituent republics.

[126] *Id.*, Sections 25, 32, 33, 38, 42, 48, 50 (this section gives the general outline of duties).

[127] *Id.*, Section 23.

determinable by objective statutory criteria is limited, and its final determination lies with the administrative authorities. In the majority of cases, these are the superiors of the inventor or the originator of an improvement. Therefore, the soviet patent law is rather a system of bonuses to the employees for any kind of suggestion improving production. Executives and technical personnel who are helpful in the development of an improvement are automatically rewarded together with the originator from the funds assigned for financing the invention.[128] Moreover, the Stalin prizes annually issued are given to inventors beyond and above their regular remuneration.[129] Consequently, the profit that an inventor may derive from his invention depends to a large extent upon its evaluation by various higher and lower government officials who appraise the invention.

The soviet jurists think that "the purpose of soviet law governing inventions is the full and timely utilization of invention in the socialist economy as well as the protection of the interests of the inventor."[130] They criticize the position of the inventor in the capitalist world in the following terms:

> In bourgeois society, patent law is designed to protect the interests of the capitalist and not those of the true inventor. In the majority of instances, inventions are made by the employees of an enterprise. But patents for these inventions are usually appropriated by the owners of the enterprises. . . . In a capitalist society invention is merchandise the price of which is fixed by the party which is economically stronger. All profits from an invention go, as a rule, to the pocket of the capitalist. Only in exceptional cases, the inventor succeeds in using the benefits flowing from his invention, but in these cases he himself becomes a capitalist.[131]

[128] *Id.*, Section 22.
[129] See Chapter 3, p. 96, note 9.
[130] 2 Civil Law (1944) 253.
[131] *Id.* 250–252.

However, if the soviet patent law is analyzed from the point of view of the interests of the inventor, it is less advantageous than nonsoviet patent law. Outside of the Soviet Union, he may occasionally surrender his right to a financier or industrialist, but he has the benefit of choice and bargaining. In any event, no law prevents him from developing his invention. But in the Soviet Union the only feasible method of deriving benefit from an invention, the certificate of authorship, automatically deprives the inventor of the right to his invention and leaves the remuneration for it to the determination of government officials, managers of the governmental plants, factories, et cetera. A soviet citizen is also deprived of the right to patent or to utilize his invention abroad without the permit of the government.[132] That the interests of a soviet inventor do not gain full protection is tacitly admitted by the soviet textbook of 1944, which qualifies its statement concerning the protection of these interests as follows:

> However, it should be pointed out that soviet inventors, in contrast to inventors in a capitalist society, are not interested in retaining a monopoly for their inventions; being advanced men of production, they are concerned with the utmost utilization of their suggestions by the socialist enterprises.[133]

In other words, unselfish surrender of his interests to the benefit of the State is expected from a soviet inventor.

9. Patents to Aliens

It remains to state in brief the possibilities for an alien to obtain a soviet patent. The general requirements of application for patent and the concept of nov-

[132] *Lex cit.*, note 90, Section 67. See *supra*, note 94.
[133] 2 Civil Law (1944) 254.

elty stated hereinbelow are also applicable to inventions made by soviet citizens.

On the basis of reciprocity, patents and certificates of authorship may be issued to aliens, who enjoy all the rights resulting therefrom on an equal footing with soviet nationals.[134] Persons who continuously reside abroad must submit all matters involving issuance of patents through the U.S.S.R. Chamber of Commerce.[135] The applications must state the person who made the invention, the kind of improvement, the inventor's place of work, his address (foreigners must also give their nationality), and the name of the invention. A description of the invention with the necessary drawings must also be appended to the application. The essential elements of the invention must be stated in the description with such precision, clarity, and completeness as to show the novelty of the invention and, in addition, to make possible on the basis of the description the realization of the invention. The ministry may request a supplement to the material filed.[136] Priority of application begins from the date when the application is received by the ministry and, in case of a dispute, from the date on which it was mailed or handed over to the proper agency, if it is an invention involving national defense.[137] The receipt of the application must be acknowledged.[138]

Each application filed with the ministry shall be examined for the purpose of ascertaining its substantial novelty and usefulness.[139] The Bureau of Invention de-

[134] *Lex cit.*, note 90, Section 11.
[135] *Id.*, Section 44.
[136] *Id.*, Sections 25, 27.
[137] *Id.*, Section 26.
[138] *Id.*, Section 31.
[139] *Id.*, Section 29.

cides the issue of novelty.[140] As a basis for the test of novelty, previously issued certificates of authorship and soviet, presoviet, and foreign patents, applications made previously, literature issued within the Soviet Union, and foreign literature shall be used, as well as information concerning the practical use of the invention.[141] If several persons are jointly responsible for the invention (co-inventors), each of them shall be authorized to obtain a certificate of authorship indicating the name of each of the co-inventors. Persons who gave the inventor technical aid are not to be considered co-inventors.[142] Whoever has used the invention within the confines of the Soviet Union independently of the inventor and prior to the filing of the patent, or has made all the preparations for such use, retains the right to further use of the invention (right of prior use).[143]

If a patented invention is considered to be "of special importance to the State," the government may take over the patent or issue a license to a government agency for the use of the invention against the will of the inventor, in which case the amount of remuneration is determined by the administrative authorities.[144]

10. Miscellaneous Provisions

The right to obtain a certificate of authorship or a patent descends by inheritance. However, if a person other than the inventor files such application, the name of the inventor must be stated in the patent. Where a certificate of authorship is issued, only the right to re-

[140] *Id.*, Section 33.
[141] *Id.*, Section 30.
[142] *Id.*, Section 37.
[143] *Id.*, Section 4, subsection (c).
[144] *Id.*, subsection (d).

muneration and not the other privileges are available to the heirs of the inventor.[145] Any transfer of patent in whole or in part must be registered with the ministry which issued the patent and the Bureau of Invention attached to the State Planning Commission.[146]

Special rules regulate those inventions which are to be secret and the so-called supplementary inventions.[147]

VI. Copyright

1. General Survey of Imperial Copyright Law

The first statutory provisions on copyright in Russia were enacted in 1828.[148] Copyright was conceived therein as the exclusive right of the author or translator to publication and sale of his work during his lifetime.[149] No particular registration was required for recognition and protection of the copyright. It was conceived as vested in the author or translator by the mere fact of creation of the work. This principle of copyright as the right of the author (*droit d'auteur, Urheberrecht*) was maintained by the imperial laws[150] and taken over by the soviet legislation when protection of copyright was restored under the soviet regime (see *infra*). Under the enactments of 1828, copyright descended, upon the death of the author or translator, to his heirs, beneficiaries,

[145] *Id.*, Section 6.

[146] *Id.*, Section 4, Note.

[147] *Id.*, Sections 54–66.

[148] Statute on Censorship of 1828, Sections 135–139 and the Statute on the Rights of Authors appended thereto. Second Complete Collection of the Laws of the Russian Empire, 1828, text No. 1533.

[149] See *infra*, note 154.

[150] Law of March 20, 1911, Third Complete Collection of Laws of the Russian Empire, text 34,935 incorporated into the General Code—Svod Zakonov as Section 695 [1]–695 [15] of the Civil Laws (Vol. X, Part 1, 1914 ed.):

2. The author shall have the exclusive right to reproduce, publish and disseminate his work by all possible means.

and other successors and was protected for twenty-five years after the death of the author or translator.

But, on January 8, 1830, it was enacted that if the author or his successor issues a new edition five years before the expiration of the term of copyright, its protection is extended for ten more years after the normal expiration of the term.[151] Copyright was expressly designated as the ownership right of the author or the translator to his work. On April 15, 1857, the term of copyright was extended to fifty years after the death of the author or translator,[152] and this term was maintained by the subsequent imperial legislation.[153] Provisions concerning copyright to musical works and works of fine art were added by the Acts of January 9, 1845, January 1, 1846, and April 15, 1857.[154]

A new comprehensive law on copyright was enacted in a constitutional legislative procedure on March 20, 1911, covering literary works, music, fine arts, and photography.[155]

2. Some Special Features of Russian Copyright

Although this law followed in the main the contemporary Western European ideas on the protection of copyright, some characteristic features of the Russian copyright law were maintained. They are of special

[151] Second Complete Collection of Laws of the Russian Empire, text 3, 411.

[152] *Id.*, text 31, 732.

[153] *Lex cit. supra*, note 150, Section 11.

[154] *Op. cit. supra*, note 151, texts 18, 607; 19, 569; 31, 732. Provisions of all these laws were incorporated with subsequent amendments in various parts of the General Code of Laws—Svod Zakonov—in various editions but finally were appended as a special statute to Section 420, Note dealing with ownership, of Vol. X, Part 1, Civil Laws. Section 1 of this statute reads:

Every author or translator of a book shall enjoy for his lifetime the exclusive right to publish and vend it in his discretion as his legally acquired property.

[155] See *supra*, note 150.

interest because in a more developed form they have been later carried over into the soviet legislation. Protection of the right to a published work was secured only if the work appeared in Russia or, provided the work appeared abroad, if the author or the translator were a Russian subject.[156] However, no work published and copyrighted abroad could be reprinted in Russia in the original language without the consent of the person enjoying the foreign copyright to it.[157] It could be printed in a translation (see *infra*). Imperial Russia did not join any general international convention for protection of copyright (Bern Convention and its subsequent amendments). However, after the enactment of the Law of March 20, 1911, Russia entered into four separate conventions for mutual protection of copyright, viz., with France,[158] with Belgium,[159] and Denmark[160] for a period of three years, and with Germany for a period of five years.[161] During World War I, the Russo-German convention ceased to be effective. It was restored under the Brest Litovsk Treaty between the soviet government and Germany in 1918, but it lost its effect again under the Versailles Treaty (Article 292) by virtue of which Germany undertook to consider all the treaties made with Russia annulled. As was mentioned elsewhere, the effect of the international treaties entered into by the presoviet governments of Russia is somewhat dubious.[162] But, in any event, by August 1, 1918, all the conventions on copyright made by imperial

[156] *Lex cit. supra*, note 150, Section 4 (Section 695[4] of Vol. X, Part 1 of Svod Zakonov).
[157] *Id.*, Section 32 (695[32]).
[158] In effect from November 12, 1912; expired on November 3, 1915.
[159] In effect from January 15, 1915; expired on January 15, 1918.
[160] In effect from July 29, 1915; expired on July 29, 1918.
[161] In effect from August 1, 1913; would have expired August 1, 1918.
[162] See *supra*, Chapter 8, VI.

Russia would have expired even without any repudiation.[163] Thus, the Soviet Union has been free from any international obligation since that date, and has not thus far entered into any international agreement on the subject of mutual protection of copyright. At present the soviet law extends copyright to works published within the Soviet Union or located there in a presentable form. A work published abroad or located there is protected by the soviet law only if the author is a soviet national.[164]

Another particular feature of the imperial law involved the right of translation and in this respect the soviet law went further away from the international standards than did the imperial law. Prior to the law of 1911, the general principle was that a publication which appeared in Russia, to say nothing of a foreign publication, could be translated by anyone and published without the original text. Exception was made for works "which required special scholarly research." Their authors were entitled to reserve the exclusive right of translation by announcing this reservation simultaneously with the publication of the original text and by publication of a translation within two years after the appearance of the original work. Otherwise, anyone was free to publish a translation which did not preclude others from making their own translations.[165] The Law

[163] See notes 158–161.

[164] U.S.S.R. Laws 1928, text 246, Sections 1–3. For translation of this law see Vol. II, No. 27.

[165] Vol. X, Part 1 of the Code of Laws (Svod Zakonov), Appendix to Section 420, Note 2.

A book printed in Russia may be published in translation into another language only without the original text. Authors of books which required special scholarly research shall have the exclusive right to their publication in Russia also in other languages; however, they must announce their intention to use this right on the publication of the original book and must issue their translation before the expiration of two years from the time of appear-

of March 20, 1911, still permitted publication of translations of works of alien authors which appeared abroad. Regarding works which appeared in Russia or foreign publications by authors who were Russian subjects, the law made the former exception for scholarly works a general rule. A Russian author or the author of a publication which appeared in Russia enjoyed the exclusive right of translation, provided he printed a reservation clause on the title page or in the preface. This right was protected for ten years provided he published the translation within five years after the publication of the original.[166]

The soviet law went further toward freedom of translation. It does not consider translation any infringement of copyright whatsoever, regardless of whether a work has appeared in the Soviet Union or abroad, and regardless of the nationality of the author.[167] The opinion was voiced recently that thereby a disadvantage is created to authors who write in the languages of numerous small racial minorities of the Soviet Union. Under a law of 1947, such authors are paid 60 per cent of the regular rate for translations of their works.[168]

The law of 1911 sought to protect a Russian author against the publisher. Any person to whom the copyright was assigned was prohibited to publish or perform the work with any additions, omissions or other alterations without the consent of the author, except those necessary alterations which the author could not rea-

ance of the original. If these conditions are not observed, publication of such book in a translation is open to anyone who wishes to do so.

166 *Lex cit. supra*, note 150, Sections 33, 35 (695[33], 695[35]).

167 *Lex cit. supra*, note 164, Section 9, subsection (a).

168 2 Civil Law (1944) 235; R.S.F.S.R. Laws 1947, text 31, Art. VII.

[Soviet Law]

sonably refuse.[169] Any assignment of the copyright or a part thereof in a future work was valid only for five years, even if the contract provided for a longer term.[170] Similar provisions are to be found in the soviet laws.[171]

3. Soviet Legislation

The soviet legislation dealing with copyright was inaugurated by the Decree of December 29, 1917,[172] authorizing the government department of education to declare a government monopoly for a period of five years on publishing the late Russian classics. The copyright for such works has for the most part expired and the decree in fact affected only the publishing business. But soon after, on November 26, 1918,[173] the same right to declare government monopoly was extended to "all works of science, literature, music, or fine arts of any kind, whether published or not, no matter in whose possession they are." [174] The publishers were to be compensated for the actual expenses for publications, including the honorarium paid to the authors, according to a schedule to be promulgated. The authors of works so nationalized were to be paid according to the same schedule. The works of some seventeen composers and fifty writers were nationalized under this decree.[175] Another Decree of October 10, 1919,[176] declared null and void all prerevolutionary assignments by authors to the

169 *Lex cit. supra*, note 150, Sections 20, 70.

170 *Id.*, Sections 8, 9.

171 R.S.F.S.R. Laws 1928, text 861, Section 19 sets four years as a maximum period for a publishing contract. See Vol. II, No. 28. For standard publishing contract, see No. 29.

172 R.S.F.S.R. Laws 1917–1918, text 201.

173 *Id.*, text 900.

174 *Id.*, Section 1.

175 R.S.F.S.R. Laws 1919, text 414; *id.* 1923, text 213; *id.* 1925, texts 309 and 336. For summary see Vol. II, No. 28, Section 14, comment.

176 *Id.* 1919, text 492.

publishers of their works. The Decree of November 26, 1918, stated that works not monopolized by the government could be published and sold during the lifetime of the author only with his consent.[177] All these decrees reveal a tendency towards two principles: government monopoly of publishing activities on the one hand, and remuneration of the authors in accordance with a schedule on the other hand.

After a certain recess during the period of New Economic Policy in following these principles, the soviet law arrived in the 1930's at the most effective realization of this program. However, the laws on the statute books dealing immediately with copyright do not make the real situation plain. They were enacted at the very end of the New Economic Policy and are couched in more traditional terms than the actual possibility of their application goes. They must be analyzed in conjunction with the regulation of publishing activities to obtain the real situation.

To be sure, protection by copyright of the right of authors was promised in the Decree of May 22, 1922, on protection of property rights.[178] However, not until January 30, 1925, was a federal act on copyright promulgated,[179] followed by the R.S.F.S.R. Act of October 11, 1926,[180] and acts of some other soviet republics developing the principles of the federal act in more detail. Authors were accorded an exclusive right to publish and circulate their works and derive other material benefits for a period of twenty-five years from the first appearance of the work. [181] For certain specified kinds of

177 R.S.F.S.R. Laws 1917–1918, text 900, Section 3.
178 Concerning this act, see *supra* p. 22.
179 U.S.S.R. Laws 1925, text 67.
180 R.S.F.S.R. Laws 1926, text 567.
181 *Id.*, Sections 3, 5.

works the period of protection was shorter. But these acts were repealed and replaced by the federal Act of May 16, 1928.[182] On the basis of this act an R.S.F.S.R. Act of October 8, 1928,[183] a Ukrainian Act of February 6, 1929,[184] and a Byelorussian of January 14, 1929,[185] were promulgated and are still in force. An Act of March 23, 1938,[186] concerning the organization of motion-picture production, to some extent has affected copyright in this field.

Under these acts copyright is protected during the lifetime of the author,[187] and for fifteen years after his death for his heirs by operation of law and testamentary beneficiaries.[188] A ten-year period of protection which begins with publication or public performance[189] is established for periodicals, encyclopedias, choreographic works, motion-picture scripts and films, pantomimes,[190] and collections of photographs.[191] For individual photographs the term is five years.[192]

In conformity with the liberal economic spirit of the time when the still effective copyright laws were enacted, it is stated that the author enjoys within the above period of time "the exclusive right to publish his work . . . and to reproduce and circulate his work by any legal means . . . and likewise to derive profits from such right in any lawful manner."[193] But the legal

[182] U.S.S.R. Laws 1928, text 246. For translation see Vol. II, No. 27.
[183] R.S.F.S.R. Laws 1928, text 861. For translation see Vol. II, No. 28.
[184] Ukrainian Laws 1929, text 55.
[185] Byelorussian Laws 1929, text 8.
[186] U.S.S.R. Laws 1938, text 82.
[187] U.S.S.R. Laws 1928, text 246, Section 10.
[188] *Id.*, Section 15.
[189] *Id.*, Section 13.
[190] *Id.*, Section 11.
[191] *Id.*, Section 12.
[192] *Ibid.*
[193] *Id.*, Section 7.

means of reproducing a work and the lawful manners of deriving benefit appear highly restricted. The soviet author has no means to publish his work himself, nor can he use the services of a private publisher or even a private printer. Since the law of 1932, any printing (including mimeograph) establishment requires a license which under this law may be issued only to a "governmental, public, or co-operative organization." [194] As shown elsewhere, the public and co-operative organizations are also under the control of the government.[195] Some obsolete laws providing for the possibility of issuing licenses for publishing activities to private persons are still on the statute books, but any such licenses have been discontinued since the early 1930's. As the soviet textbook of 1944 states: "Under the concentration of all publishing activities in the U.S.S.R. within the socialized portion of economy, only governmental, public, or co-operative publishing offices may be publishers." [196] Therefore, the textbook of 1938 warns that:

> The phrase in the statute concerning the right of the author to reproduce and circulate his work should not be taken in the sense that the author himself may publish and distribute that work. These operations are at present performed in the U.S.S.R. by special organizations of the socialized economy, in particular the publishing offices, which themselves organize the process of issuing a work and perform its distribution by means of a corresponding machinery. But they can do it, of course, only with the consent of the author.[197]

[194] R.S.F.S.R. Laws 1932, text 288; Provisional Rules issued by the Main Office of Police (Militsia) of the R.S.F.S.R. of December 7, 1931, No. 576957; Evtikhiev and Vlasov, Soviet Administrative Law (1946) 229. See also Chapter 2, pp. 65, 66; see also Fogelevich, Laws Concerning the Press (Russian 4th ed. 1934).

[195] See p. 412.

[196] 2 Civil Law (1944) 240; 2 Civil Law Textbook (1938) 305. "Private publishing was continuously reduced and by 1931 and 1932 had ceased altogether." Martynov, "Basic Problems of Copyright" (in Russian 1941) Soviet State No. 4, 31.

[197] 2 Civil Law Textbook (1938) 264.

Such a situation does not fit any longer the characteristic of the soviet copyright as an exclusive right given in the federal act of 1928. The soviet textbook of 1944 correctly suggests that here lies the basic difference between the soviet and capitalist copyright. The textbook states:

> An author in the U.S.S.R. does not have any monopoly in his work and does not need it; if the work deserves wide circulation the socialist society will be also interested therein. As any other toiler, the author has the right to remuneration in accordance with the quality and quantity of his labor, if the product of his labor is used by society. Here lies the difference in principle of soviet copyright from the copyright of capitalist countries which do not consider remuneration for the author's labor the essential condition of copyright. With us, even if the author did not enter into a stipulation concerning his remuneration, he is nevertheless guaranteed a minimum honorarium.[198]

Consequently, some soviet writers have recently expressed the opinion that the characteristic of soviet copyright as an exclusive right should be dropped from the statutory provisions. They fail, however, to offer a clear characteristic instead. They almost identify the copyright with the right to remuneration and therefore with wages.[199] The authors of the textbook of 1944 point out that the identification of copyright with wages would mean that the government acquires the right of publication by the fact of creation of a work, which is not the case because such right is acquired by the government mostly under a contract. They think the soviet copyright is "exclusive" in the sense that it is protected within certain limits from any infringement. But they

[198] 2 Civil Law (1944) 226.

[199] Gordon, "Concept of the Soviet Copyright" (in Russian 1939), 1 Uchenye Zapiski (Transactions) of the Kharkov Law Institute 100; Martynov, *op. cit.* 31 *et seq.* and literature cited therein, note 47; Kheifets, Copyright (in Russian 1932) 46 *et seq.*

also recognize that the government may order publication without the consent of the author.[200]

As is evident from their statement quoted above, the authors of the textbook tacitly admit that the soviet copyright may not be defined as the exclusive right of the author to his work. They fail, however, to offer a constructive doctrine of copyright under the soviet law. Their difficulty is obvious: the statutory definition of 1928 does not fit the present situation. "Concentration of publishing activities in the socialized portion of the national economy," i.e., the government monopoly of publishing and printing, has reduced the rights of the author provided for in the copyright laws of 1928 to the right not to publish his work and to the right to be paid if a government publishing office publishes his work, whether with or without his consent. But in order to be published, a literary work must be directly contributive to one or another goal set by the government. The Resolution of the Central Committee of the Communist Party of August 14, 1946, may be referred to as a recent example of the requirements which a literary work must meet to be printed. "Any preaching of absence of ideology and of keeping literature out of politics" [201] is severely condemned. Lenin's motto that "every literature must be Party literature" is emphasized as the expression of the soviet approach to literature. Zhdanov, secretary of the Central Committee, commented on this resolution:

> Our literature is not a private enterprise designed to serve various tastes of the market. We are under no obligation to give space in our belle-lettres to tastes and customs which have nothing in common with the morale and properties of the soviet

200 2 Civil Law (1944) 227. *Cf.* Sections 13, 14 of the R.S.F.S.R. Copyright Law. See Vol. II, No. 28.

201 (1946) Bolshevik (in Russian) No. 17/18, 13.

people. . . . We demand that our comrades, who are the leaders of literature, as well as the writers themselves, be guided by something without which the soviet regime cannot exist, that is, politics, so that our youth may be reared not in the spirit of nonchalance and absence of ideology but in the spirit of alertness and revolution.[202]

This explanation makes clear that the government monopoly of printing in the Soviet Union is in fact an essential limitation on the author's right and should be borne in mind in the perusal of the laws on copyright printed in the second volume.

Restricted as is the right of the author, it originates with the creation of the work. In that the soviet copyright is not, technically speaking, a copyright of the American type but the right of the author of the type of the French *droit d'auteur* or the German *Urheberrecht*. Although the soviet statutes provide for registration of works subject to copyright, the sole purpose of such registration is to certify the time of publication of the work and thereby eliminate any doubt as to the time when the protection expires. The author's right is protected regardless of whether or not the work is registered. The data certified by the registration may be contested in court.[203]

[202] *Id.* 9, 12.

[203] R.S.F.S.R. Laws 1928, text 861, Section 9. The registration is regulated by the Rules of the People's Commissar for Education of August 8, 1929 (1929) Weekly of the R.S.F.S.R. People's Commissariat for Education, No. 43, also Fogelevich, *op. cit.* (1937) 76. It reads in part:

1. The registration under the present rules shall be made solely for the purpose of certifying of the time of the first appearance of a work, by making an entry in the register:
   (a) Of the time of the first edition of the work;
   (b) Of the time of the first public performance of an unpublished work, or a work published after its first public performance;
   (c) Of the first public exhibit of a work of fine arts at an exhibition, if prior to that it had not been reproduced by any printing method (typography, lithograph, and the like).

Chapter 17

Inheritance Law

I. Preliminary

The soviet law of inheritance has suffered several drastic changes. Not only have the statutory provisions changed, but the attitude of soviet jurists to the very institution of devolution of property on death has presented a constantly changing picture.

From the time of the Communist Manifesto of 1848, abolition of inheritance of property has been considered a cornerstone of the socialist program, and, as early as the fourth month of the soviet regime, the abolition of rights of succession was bluntly proclaimed. Some use of the decedent's property by his next of kin was admitted only "until the issuance of a decree concerning universal social insurance" (see *infra*, III). When rights of succession, with substantial limitations, were again enacted in 1922 under the New Economic Policy, the leading soviet jurists looked upon this measure as a concession to private capitalist law "in principle and in practice." [1] They still did not consider inheritance of property a sound institution; it was permitted within narrow limits for economic reasons, viz., "to stimulate the accumulation of private wealth as permitted by law." [2]

In 1935, after the completion of the First Five-Year Plan, the textbook on soviet civil law stated plainly that

[1] Goikhbarg, 1 Economic Law (Russian 1st ed. 1923) 176; *id.* (2d ed. 1924) 234.

[2] *Id.* (2d ed.) 235.

there is no place and no need for inheritance of property under a communist regime. There is no place for it, because there must be no unearned profit in the communist system. There is no need for it, because the able-bodied will work and thus have their living secured, while the disabled will be taken care of by the State through social insurance.[3]

The actual development of soviet legislation however, shows a different tendency. After 1923, inheritance of property apparently became firmly entrenched, and the restrictions on its scope have been progressively reduced with each amendment. Thus, protection by law of "the right of inheritance in personal ownership" was incorporated in the U.S.S.R. 1936 Constitution now in force (Section 10). The soviet textbook on civil law of 1938 no longer sees a corollary of private ownership in inheritance. If private capital is barred from any productive investment and private ownership is limited to the articles of consumption and small housing, as is the case in Soviet Russia, inheritance of property loses its undesirable "capitalistic" feature and must be accepted as a sound institution of soviet law. This is the gist of the explanation to be found in the textbook of 1938:

> Under the conditions established by the victory of socialism, the exploiting classes having already been liquidated and capitalist ownership abolished, the right of succession cannot become a source of exploitation. The recognition of this right in the U.S.S.R. Constitution demonstrates its importance for the citizens of a socialist society.
>
> Various anti-Marxist constructions were formerly voiced in the doctrine of soviet inheritance law. A number of [soviet] jurists who wrote on problems of inheritance law considered succession in the Soviet Union to be a capitalist institution and denied its socialist character. The authors of the subversive

[3] Gintsburg, 1 Course 386 *et seq.*

conception of "economic law" attempted to liquidate the very concept of inheritance law. These wrongdoers attempted to impose the view that inheritance of property under soviet law is merely a private form of, and substitute for, social insurance. It is obvious that such a view is absolutely incompatible with the basic principles of the soviet inheritance law as established by Stalin's [1936] Constitution. The soviet socialist inheritance is basically different from inheritance in society based upon exploitation. In such a society, the law of inheritance serves the purpose of strengthening private ownership and exploitation based thereon . . . In the Soviet Union the law of inheritance is a means of strengthening and protecting personal, earned ownership. The descent of his property cannot be an irrelevant matter for a citizen of the U.S.S.R. Establishment of succession appears to be one of the stimuli for development of personal ownership, for increase in the productivity of labor, and for fortifying the socialist family.[4]

The textbook of 1944 repeats this criticism of the early attitude of the soviet jurists on inheritance and justifies the necessity of succession rights in the Soviet Union by the following reasons:

> In the country of victorious socialism, in which capitalist ownership has been annihilated and the exploiting classes at the same time have been liquidated, the inheritance law cannot become a source of exploitation. Socialist inheritance law promotes the protection of the personal ownership of the toilers, the increase of the productivity of labor, strengthening the soviet family and fortifying the relations uniting the citizen of the U.S.S.R. with the socialist society. . .[5]

Strange as it is, in 1926 the removal of the limitation of inheritance to 10,000 rubles value was officially motivated by the intention of the soviets to secure "continued existence" of private enterprise,[6] but in 1938 and 1944 the abolition of this very private enterprise in Soviet

[4] 2 Civil Law Textbook (1938) 450–451.
[5] 2 Civil Law (1944) 277. See also Zimeleva (1945) 320.
[6] R.S.F.S.R. Laws 1926, text 73, Preamble uoted *infra*, p. 628.

Russia is given as the reason for inheritance of property being a sound institution of soviet socialist law.

However, the textbook deems it necessary to remind students of the future disappearance of inheritance, although clearly postponing this to the far distant future, almost beyond human prediction. According to the textbook:

> Inheritance will lose practical significance only with the achievement of the higher stage of communism, "when," as Marx says in the Critique of the Gotha Program, "together with the many-sided development of individuals, the productive forces shall also grow and all the sources of collective wealth shall flow in a full current" (Marx and Engels' Collective Works, Russian ed., 275). Inheritance will then become unnecessary, because all toilers of a communist society will always be able to obtain from the all-national economy a complete satisfaction of their needs.[7]

Thus, the soviet law of inheritance appears to be a compromise between the original plan for the complete abolition of the institution and its stubborn vitality. Before discussing the successive stages of the system of inheritance of property under the soviet regime, a brief outline of some aspects of succession under the preceding imperial regime may help to make plain some features of soviet law.

II. Inheritance Under Imperial Law

The regulation of inheritance rights under the imperial regime was far from simple and uniform. The so-called general civil laws which formed Volume X, Part 1, of the General Code of Laws promulgated in 1832 (*Svod Zakonov*) contained rules of testate and intestate succession more or less of the Western Euro-

[7] 2 Civil Law (1944) 277.

pean type. The freedom of the testator, however, was limited in that he could not dispose by will of real property which he had himself inherited from the preceding generation of his family (the so-called patrimonial estate — *rodovoye imushchestvo*, Sections 348–400, 1068). Otherwise, the testator was at liberty to dispose of his estate, without regard to the claims of relatives. His descendants, parents, or spouse were not secured, under the imperial law, any portion of his estate as is done in many European countries and which is called *légitime* (*portio legitima*). However, the rules of the general civil law were not applicable to inheritance among the peasants in regard to the land received by them at the emancipation of the serfs in 1861 and properties pertaining to their farming on this land (so-called "land allotments"). The law did not recognize any testate succession in these properties and land, while intestate succession was subject to local custom.[8]

[8] General Statute on Peasants (1902 ed.) Sections 13, 135; Civil Laws. Svod Zakonov (Code of Laws) Vol. X, Part 1 (1914 ed.) Section 1184. subsection (5); Redemption Statute (1863 ed.) Section 116; Emancipation Statute for Great Russia (1902 ed.) Section 15; Emancipation Statute for Crown Peasants (1866 ed.) Section 41.

"Held, that the allotted land as well as movable property incidental to farming on such land cannot be disposed of by a will." Ruling Senate, General Assembly, Decision of November 3, 1897, No. 29. See Leont'ev, Peasant Law (in Russian 1909) 375 *et seq.* This author has abstracted from statutes and the rulings of the Senate the following principles regarding succession among the peasants:

(1) Disputes over succession in any kind of property tried by the peasant courts (*volost* court) shall be determined on the basis of local customs; (2) whenever a case is tried in ordinary courts, the custom shall apply to any kind of property of the peasants, provided that one of the litigants referred to custom and presented evidence thereof; (3) the custom of a village to which the peasant belonged shall not be applied by the ordinary courts if the peasant severed his ties with this place, lived somewhere else, and left the property at the place of residence. In such case the general laws (Vol. X of the Svod Zakonov) shall apply; (4) in the ordinary courts in the absence of a reference by a litigant to the custom or if the existence of a custom has not been proven: (a) the special order of succession deduced by the Senate from the essential rights of peasants to the allotted land shall apply with regard to the land and property incidental to it; (b) with regard to all other

The local peasant customs concerning inheritance never developed into a common customary law, because they varied considerably from place to place. However, one principle seemed to be noticeable behind the variety of scattered rules and was recognized by the Ruling Senate, the supreme tribunal of imperial Russia. Properties pertaining to farming of the peasant type and the household of a peasant family were for the most part considered to be in the joint ownership of all the members of the household rather than the personal ownership of the head of the household. Relationship by blood was of less importance than joint life and labor within the same family. Consequently, strangers informally adopted by the family of the deceased (*priymaki*) or his sons-in-law who were living in his household, usually had a share in his estate, while sons who had established separate farmsteads or married daughters who were living with the family of their husbands, were generally excluded from the succession. In brief, among the peasants the estate descended—using the terms of Roman law—to the *agnati,* i.e., the members of the same household, and not to the *cognati,* the relatives by blood of the deceased. These rules, regarded before the Revolution as antiquated remnants of tribal organization, have exercised a strong influence upon the soviet legislation concerning succession in farming families.[9]

III. Inheritance Under Militant Communism

The first soviet decree concerning inheritance of April 27, 1918,[10] stated outright:

property the general rules of Vol. X of the General Code shall apply. *Id.* 375–376.

[9] *Infra,* Part V, 2, and Chapters 18 and 21.

[10] R.S.F.S.R. Laws 1917–1918, text 456.

1. Testate and intestate succession are abolished. Property of an owner (movable as well as immovable) becomes after his death the domain of the Russian Socialist Federated Soviet Republic.

The Law of March 11, 1919, promulgated in the sister soviet republic, the Ukrainian Republic,[11] contained a similar provision.

However, the abrogation of succession in Russia was not complete. Though in principle repealing rights of succession, the law and especially its interpretation admitted certain close relatives to the use of the estate. Thus, an estate not exceeding 10,000 rubles would "pass to the immediate management and disposal" of the decedent's descendants, ascendants, brothers and sisters, and surviving spouse who had lived with him (Section IX). The same relatives, if they were propertyless and disabled, were authorized to receive from an estate exceeding 10,000 rubles a sum necessary for self-support, "until a decree for universal social insurance is issued" (Section IV).

Finally, according to the Decree of the Commissariat for Justice of May 21, 1919, promulgated under the title of "interpretation" of the above law, the 10,000 rubles limit on the estate was not applicable to peasants' farmsteads; in other words, properties belonging to a peasant farmstead had to remain in the possession and use of the spouse and the relatives of the deceased living in his household, regardless of the value of the estate.[12] It was a tacit recognition of the peasant customary law of succession.[13]

In any event, the soviet government had, at the time,

[11] Ukrainian Laws 1919, text 268.
[12] R.S.F.S.R. Laws 1919, text 242.
[13] Stuchka, 1 Course (1st ed. 1927) 176.

no adequate apparatus to check upon all the estates in Russia. With regard to the peasants, the retreat from the abolition of inheritance was officially recognized by the above interpretation, while in the cities, according to the soviet writers, nobody had reported the estates of decedents to the authorities, these usually being divided among the individuals who happened to be present at the time of death. No estate actually taken by the State was recorded during the time that the law abolishing succession was in force.[14] It remained a purely declaratory statement.

Nevertheless, the Third Division of the R.S.F.S.R. Commissariat for Justice, which exercised the function of interpreting the laws, stated definitely that "succession rights were introduced only on January 1, 1923," [15] and thus did not consider the above-mentioned rights of relatives as succession rights. The same view was shared by the soviet jurists when they discussed the subject during the period of the New Economic Policy. Thus Goikhbarg wrote in 1923 that "the Decree of April 27, 1918, has annulled altogether the entire institution of succession as such, leaving nothing of this institution in any respect, nor any part thereof." [16] Similarly, Professor Serebrovsky in his commentary on the Civil Code insisted that exceptions made for small estates and close relatives of the decedent "have nothing in common with succession; they are based on motives of a special kind, viz., the desire to give security to disabled persons who are the decedent's next of kin, provided they have had

[14] Goikhbarg, 1 Economic Law (Russian 1st ed. 1923) 176.

[15] Third Division of the R.S.F.S.R. Commissariat for Justice, Ruling of August 7, 1923; Malitsky 21; Nakhimson, Commentary 4.

[16] Goikhbarg, *op. cit.* note 14 at 176, 177.

some connection, economic or as workers, with his property." [17]

However, when later on the eve of the succession reform of 1945, the general attitude toward the role of succession in a socialist state changed, a monograph by Davidovich appeared in 1939 which sought to prove that the decrees of the period of Militant Communism did in fact contain the elements of a new law of inheritance.[18] Though his conclusions were criticized by Bratus,[19] who correctly pointed to the provisions of Section I of the Decree of April 21, 1918, and to its title, "Abolition of Succession," they found partial support in another monograph written in 1945 by Serebrovsky, to whom the decree appears at present in a new light. He points out that estates of less than 10,000 rubles were to pass to the "management and disposal" of the close relatives of the decedent, that another Decree, of August 20, 1918 (R.S.F.S.R. Laws 1917–1918, text 674), even called this devolution "inheritance," [20] and that the R.S.F.S.R. Supreme Court in 1924 and 1929 ruled that holders of property under the above-quoted provisions of Section IX of the Decree of April 27, 1918, "enjoyed all rights pertaining to inherited property," including the right to sell it.[21] He also refers to a decision of the Leningrad Regional Court, rendered in 1938,

[17] Serebrovsky, Inheritance Law, A Commentary to Sections 416–435 of the R.S.F.S.R. Civil Code (in Russian 1925) 5.

[18] Davidovich, "Basic Problems of the Soviet Inheritance Law" (in Russian 1939) 1 Transactions (Uchenye Zapiski) of the Moscow Law Institute 58, 59

[19] (1941) Soviet State No. 3, 108, 109.

[20] Serebrovsky, "History of the Development of the Soviet Inheritance Law" (in Russian 1945) 1 Problems of the Soviet Civil Law 160 *et seq.* The same point of view is upheld in 2 Civil Law (1944) 279, for which Serebrovsky wrote the chapter on inheritance law.

[21] R.S.F.S.R. Supreme Court, Resolution of March 11, 1929, Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 1935) 46.

[Soviet Law]

which, although it abstained from calling transfer of property under this decree "inheritance," nevertheless ruled that persons who obtained the property of a decedent "for management and disposal" enjoyed all rights of ownership of such property.[22] Thus, at present, the soviet jurists are trying to find elements of inheritance even in the period when its abrogation was the official slogan of the governmental program.

IV. Inheritance Under the Civil Code and Later

1. Limitation of Inheritance Under the Civil Code by the Value of the Estate

In 1921 the New Economic Policy period brought the recognition of inheritance rights, and the Civil Code of 1922 devoted Sections 416–435 to their regulation. These sections were directly amended several times, and in addition, some of the provisions of the Land Code and the Code of Laws on Marriage, Family, and Guardianship contain indirect amendments.

The Civil Code as promulgated in 1922 sought to limit inheritance: (a) by setting at a fixed amount of 10,000 gold rubles the maximum permissible net value of an estate (Section 416); (b) by restricting the circle of persons to whom the estate might descend by intestate succession or by will (Section 418).

Thus, estates exceeding 10,000 gold rubles net value were declared to be the property of the State. However, rights arising from contracts between private persons and the government descended without any limitation in value to the heirs, and the value of these rights was not computed as part of an estate. The same was true of certain insurance premiums, according to the

[22] (1938) Socialist Legality No. 10, 84.

amendment of June 1, 1925 (Section 375*a* of the Civil Code).[23]

If the net value of the estate exceeded 10,000 gold rubles, the estate was held in joint ownership by the State and the takers, and a special procedure was prescribed for the dissolution of the joint ownership and the distribution of the estate.

Again, the limitation of inheritance by the fixed value of 10,000 rubles met with practical difficulties. Moreover, the soviet government decided "to aid the possibility of the continued existence of commercial and industrial enterprises after the decease of their owners and to establish more attractive conditions for the creation and influx into the country of material and resources."[24] Consequently, this maximum permissible value of the estate was abolished by the amendment of February 15, 1926.[25] Since then, a heavy progressive tax up to 90 per cent has alone served as a check upon value passing by inheritance.[26] However, this restriction disappeared in 1943, when the inheritance tax was abolished.[27] Thus, there is today no limitation on the

[23] R.S.F.S.R. Laws 1925, text 283.

[24] Preamble to the Law of February 15, 1926, R.S.F.S.R. Laws 1926, text 73.

[25] *Lex cit.* This was enacted in fulfillment of the federal Act of January 29, 1926, U.S.S.R. Laws 1926, text 37.

[26] The federal Act of February 6, 1929 (U.S.S.R. Laws, text 78), established only the maximal rates, leaving to the legislation of individual soviet republics the determination of the tax within these limits. Estates evaluated at up to 1,000 rubles were free from tax. Estates evaluated from 1,000 to 40,000 rubles were taxed according to two different scales: a general one and another for persons classed as kulaks, private businessmen, etc., which distinction lost its significance after the elimination of private business. The R.S.F.S.R. Laws 1929, text 793, enacted the maximum rates except from estates of less than 2,000 rubles. The Council of People's Commissars ordered on September 10, 1933, that the inheritance tax shall not be assessed upon property situated outside of the U.S.S.R. whenever it descends to persons residing in the U.S.S.R. (U.S.S.R. Laws 1933, text 349).

[27] Edict of January 9, 1943, repealing the Tax on Transfer of Property by Succession or Donation and granting to heirs of persons who perished in

value of an inheritance in Soviet Russia. A governmental fee is collected for the issuance of inheritance certificates. The scale is progressive and the highest rate is 10 per cent.[28]

2. Limitation with Regard to Precious Metals and Foreign Exchange

The monopoly of the U.S.S.R. State Bank, established in 1937, in dealing with precious metals in coins or ingots, or in the raw state, and with foreign exchange, resulted in a limitation on succession to this property. The heirs may receive only the equivalent in soviet currency, but not such property in kind. This is evident from the following:

Instruction of the U.S.S.R. Commissariat for Justice and the Board of Directors of the U.S.S.R. State Bank, of September 8, 1939.[29]

In cases where, in taking measures for the protection of the decedent's estate, the notarial offices receive foreign exchange values [*valiutnye tsennosti*] (gold, silver, platinum or metals of the platinum group, in the raw state, in coins, ingots, or as raw materials, foreign currency), or instruments made payable in foreign exchange (bills and notes, checks, money orders, et cetera), as well as when such foreign exchange values consti-

defense of the country privileges in paying governmental fees. Vedomosti 1943, No. 3.

1. The tax on transfer of property by succession or donation shall be hereby repealed and the unpaid sums canceled.

2. Heirs of persons who perished in defense of the country shall be exempt from payment of governmental fees collected for issuance of certificates attesting the right of succession to property of the persons who have so perished.

3. [Ordered corresponding addition of subsection (n) to Section 3 of the Edict of April 10, 1942, on governmental fees.]

4. [This section expressly repealed the following enactments: Section 23a of the Statute on local finances (U.S.S.R. Laws 1926, text 199; 1930, text 344); Law on inheritance tax of February 6, 1929 (*id.* 1929) text 78; *id.* 1930, texts 34 and 511; *id.* 1933, text 349.]

[28] Edict of April 10, 1942, Sections 4, 13; Vedomosti 1942, No. 13; U.S.S.R. Laws 1942, text 71, Section I (r). For rates see *infra* 11.

[29] Civil Code (1948) 226.

tute the subject matter of a testamentary disposition, the U.S.S.R. Commissariat for Justice and the Board of Directors, in accordance with the Resolution of the Central Executive Committee and the Council of People's Commissars of the U.S.S.R. of January 7, 1937 (U.S.S.R. Laws, text 25), direct the following procedure:

1. In case of receipt of the foreign exchange values specified above, the notarial office shall deposit them with the office or branch of the U.S.S.R. State Bank.

2. Upon presentation by the notarial office of a certificate attesting succession rights, the office or branch of the U.S.S.R. State Bank shall pay to the heirs or their attorneys the corresponding equivalent in soviet currency, after having deducted the established taxes and dues as determined by a competent tax-assessing office.

3. If the foreign exchange values specified above constitute the subject matter of a testamentary disposition, the notarial office shall issue to the heirs a certificate attesting their succession rights only upon the presentation by them of a memorandum of the State Bank stating that the values bequeathed have been deposited with the Bank.

4. Articles manufactured from precious metals (watches, cigarette cases, et cetera) received for safekeeping by the notarial office in the course of proceedings for the protection of the estate must be deposited immediately with the office or branch of the U.S.S.R. State Bank, which shall keep them for conveyance to the heirs.

3. Original Limitations of Succession with Regard to Persons to Whom the Estate May Descend

Another limitation on inheritance established by the Civil Code in 1922 consisted in restricting the circle of persons upon whom the estate might devolve. The Civil Code introduced both traditional methods of descent, viz., succession by operation of law (intestate succession) and succession by will (testate succession) (Section 416). However, in both instances the estate could devolve only upon persons belonging to categories specified by the Code (Section 418). These persons were

the direct descendants of the decedent (children, grandchildren, and great-grandchildren), natural or adopted, sharing equally whether born in or out of wedlock, the surviving spouse, and those disabled and propertyless relatives or strangers who were actually dependents of the decedent for not less than one year before his death. In the absence of such persons, the estate devolved by escheat upon the State. Neither parents nor collateral heirs had any share in the estate unless they were actually dependent upon the deceased.[30]

Although the Civil Code had recognized wills, provided that they are made in writing before a notary public (Section 425), nevertheless the testator must have selected the beneficiaries from among the persons enumerated above who would otherwise take the estate by intestate succession (Section 422). After 1928, the testator was also permitted to leave his estate or a bequest to the State, the Communist Party, or to professional and other public organizations. The Code of the Byelorussian Republic, as amended in 1929, also permitted bequests to parents. With these two exceptions, those eligible to inherit by intestate succession were the only persons who could be beneficiaries.

Thus, under the original provisions of the Code, what the testator actually could have done was to change the share of one person or another who would participate in the estate on another basis if there were no will, or to exclude one or more of the same group of persons from the right of succession. The share of the deprived person, if not disposed of in any other way by the testator, descended to the State (Section 422, Note 1).

The right of the testator to deprive a taker of the

[30] This provision was inspired by the exclusion of collateral heirs declared by the Communist Manifesto of 1848. Goikhbarg, *op. cit. supra,* note 1 at 228.

right of succession was limited in 1928, when Note 2 to Section 422 of the Civil Code was added, protecting children under eighteen years of age from disinheritance and guaranteeing them a certain share in the estate.[31]

The narrow limits of succession set up by the original provisions of the Code were gradually extended by soviet legislation. First, in 1930 and 1935, some exemptions with regard to specific types of property were introduced; then, in 1945, the circle of eligible heirs was radically changed (see *infra,* 4 and 5).

4. Exemption from Limitations Imposed upon Testator

The scheme of limitations on free disposition by will (*jus disponendi*) was abandoned first in regard to certain types of property. This was accomplished by declaring such property not part of the estate. In this category have been included insurance premiums, several kinds of government loans, stocks and bonds, and other deposits in government banks. The owner may dispose of such assets freely, not by a will but by a written assignment addressed to the bank and indicating the person to whom deposits shall be paid after the death of the depositor. This rule was first established in 1930 for government loans deposited with government banks and savings accounts that were exempt from the limitations established for inheritance.[32] Then in 1935, it was extended to monetary deposits in government banks, and a new Section 436 was added to the Civil Code.[33]

Thus, in addition to property that forms the estate of a deceased person and comes under the limitations prescribed for inheritance, there is property not to be in-

[31] R.S.F.S.R. Laws 1928, text 468.
[32] U.S.S.R. Laws 1930, text 80.
[33] *Id.* 1935, text 43.

cluded in the estate. This descends at the discretion of the owner and has not been subject to the inheritance tax. Property of this nature, money deposits and securities, are considered in any capitalist country prima facie to be capital. The soviet regime started some thirty years ago with the abolition and confiscation of such property. At present, in theory, there exists the possibility of unlimited accumulation of private wealth in money and securities in Soviet Russia, if deposited in certain government banks. However, one circumstance is supposed to limit this possibility. This is the lack of legitimate and profitable avenues of activity that would facilitate such accumulation of capital, because private industrial and commercial enterprises are practically eliminated.

5. Succession Reform of March 14, 1945: Recognition of Succession Rights of Parents, Brothers, and Sisters: More Freedom in Disposition by Will

The rigid scheme of testate and intestate succession has been considerably changed by the Edict (ukase) of the Federal Presidium of March 14, 1945.[34] The presidia of the constituent republics were commissioned to incorporate the new rules into the civil codes of each republic (Section 4 of the edict), these rules being applicable to "all successions opened prior to the publication of the edict and not yet accepted by the heirs and not forfeited to the State by escheat" (Section 3 of the edict). The R.S.F.S.R. Presidium promulgated a new text of the respective sections of the Civil Code by the Edict of June 12, 1945.[35]

[34] Vedomosti, March 21, 1945, No. 15.
[35] *Id.* (1945) No. 38.

With regard to intestate succession, the edict introduced a system of inheritance by classes somewhat similar to that of the Code Napoléon, the German Civil Code of 1900, and other European codes. Three classes of heirs by operation of law were established so that the heirs of the second class inherit only in the absence of any heirs of the first class, or on their refusal to take the estate, and the heirs of the third class inherit in the absence of heirs of the second class.

As before, the first class embraces children and their descendants, the spouse, and actual dependents, whether or not related to the deceased, but adds to this group disabled (unable to earn) parents of the decedent. In the absence of these persons, the heirs by operation of law are the able-bodied parents of the deceased. In their absence, the estate devolves upon the heirs of the third class—the brothers and sisters.[36]

The testator, in making his will, is at liberty "to bequeath all his property or a part of it to one or several persons from among those belonging to either of the three above-mentioned classes." Consequently, in contrast to the situation under the old provisions, he may leave bequests to either of his parents or to any of his brothers or sisters. He may not, however, "deprive his minor children or other heirs who are unable to earn, of the portion which would belong to them under intestate succession."[37] In addition, the testator may, subject to certain limitations, leave bequests to "governmental agencies and public institutions." The Communist Party is not specifically mentioned, but there is

[36] Section 1 of the Edict; Section 418 of the Civil Code, as amended June 12, 1945.

[37] *Id.*, Section 2, par. 2; Civil Code, Section 422, as amended June 12, 1945.

no doubt that it comes within the meaning of a "public organization."

If there are no persons belonging to either of the three classes of heirs outlined above, "the property may be bequeathed to any person."

There is also another aspect of the reform affecting children born out of wedlock (registered marriage). Under the original provisions, natural (illegitimate) children had succession rights equal to those of children born in wedlock (marriage registered with civil soviet authorities). Under Sections 19 and 20 of the Edict of the Federal Presidium of July 8, 1944, children born out of wedlock (civil marriage registered with soviet authorities after July 8, 1944) were by implication deprived of succession rights. A new Edict of March 14, 1945, promulgated simultaneously with the above-mentioned edict of the same date, made clear that children born out of wedlock after July 8, 1944, do not inherit from their father. But it extended the right of succession to those children of a decedent, who, although born out of wedlock before July 8, 1944, were entered in the books of the Civil Status Record as his offspring (Section 2 of the edict). Such entries were made either pursuant to the declaration of the father of a child born out of wedlock or the court decree declaring paternity. The same decree also provided for "legitimation by subsequent marriage," known to many capitalist codes. It reads :

> 3. Should the mother enter into a registered marriage with a person by whom she has previously born a child and who has acknowledged paternity as regards his child, the child shall be on an equal footing in every respect with children born of a registered marriage.

Consequently, such children inherit equally with children born of a registered marriage.

The Edict of March 14, 1945, has also changed the method of distribution of an estate within the group of heirs of the first class in case of their being of various generations, e.g., children and grandchildren (see *infra* 7).

6. Descent of Home Furnishings and of the House

One group of heirs acquired a privileged position in 1929. It was then enacted that property belonging to the usual furnishings of a home, except luxuries, shall descend to those heirs who lived with the deceased, above and beyond their shares in the estate (Section 421). It has been held by the R.S.F.S.R. Supreme Court that a house used exclusively for dwelling purposes by the decedent, and of a value below 1,000 rubles, belongs in the same category as such furnishings.[38]

However, this opinion has been attacked recently

[38] There is no reason to limit the application of Section 421 of the Civil Code to cases which concern articles of household goods and household use only in the literal sense of the words (furniture, kitchenware, etc.). Under Section 421 of the Civil Code, other property may be transferred as well, in particular buildings, provided such property, in its extent and value, could not be the source of income and was used solely for serving the daily needs and requirements of the deceased and of the heirs jointly residing with him. Such interpretation of Section 421 of the Civil Code, which correctly reflects a realistic approach to the inheritance law, is substantiated in particular by the first law (of 1918) of the soviet government concerning inheritance (Section IX of the Decree of April 27, 1918, R.S.F.S.R. Laws 1918, text 456). R.S.F.S.R. Supreme Court, Plenary Session Ruling of May 20, 1930, Protocol No. 5.

Under the Ruling of the same court of December 16, 1930, Protocol No. 16, the Ruling of May 20, 1930, applies only to buildings the value of which, determined in conformity with the Instruction of the People's Commissariat for Finance, does not exceed 1,000 rubles. 2 Civil Law Textbook (1938) 456. An illustrative and not explicit enumeration of objects classified as furnishings is given in R.S.F.S.R. Laws 1929, text 793, Section 25. A list of objects considered luxuries was issued by the R.S.F.S.R Commissariat for Finance on December 25, 1929, but 2 Civil Law (1944) 292 considers this list obsolete.

(1945) in the soviet legal press, and in 1942 the U.S.S.R. Supreme Court ruled somewhat vaguely that a building should not be classed with furnishings.[39] The question arises whether furnishings are subject to free testamentary disposition, but this problem has not yet been solved by soviet jurisprudence.[40]

7. Per Capita Distribution in Intestate Succession

Prior to the reform of 1945, in cases of intestate succession the whole of the estate was to be divided per capita in equal shares (Section 420) among all the takers, regardless of the degree and kind of their relationship to the deceased. (There was no distribution per stirpes or per capita with representation.) For example, if the deceased left a spouse A, one childless daughter B, and a son C with two children D and E, and grandchildren F and G, children of a son X, who had previously died, the estate is divided into seven equal shares, one share each being allotted to A, B, C, D, E, F and G. This method of distribution to the descendants of the decedent has been changed by the Edict of March 14, 1945. While under Section 418 "the descendants" were indicated as prima facie heirs, the edict mentions "children" instead and furthermore contains the following provision:

> Should any of the children of the decedent die before the opening of the succession, his portion of the estate shall devolve upon his children (grandchildren of the decedent), and in case the latter have died, it shall devolve upon their children (great-grandchildren of the decedent).

Sections 418 and 430 of the Civil Code have been

[39] Serebrovsky, *op. cit. supra*, note 20 at 166; also (1942) Rulings of the U.S.S.R. Supreme Court (in Russian) No. 2, 36; 2 Civil Law (1944) 291.
[40] *Ibid.*; also (1937) Soviet Justice No. 16.

changed correspondingly. Thereby distribution per stirpes with representation is established with regard to the descendants. In the example given above, the estate will be divided into four parts: A, B, and C will each inherit one fourth; the remaining fourth will be divided between F and G (one eighth each), and D and E will not inherit.

The new provision obviously limits the descent to great-grandchildren of the decedent. His more remote descendants have no right of succession. Likewise, representation applies only to the descendants. Nephews and nieces cannot claim the share which would have devolved upon their parent, a brother or sister of the decedent, who died before him.

The testator may provide in his will that, should the beneficiary die prior to the opening of the succession or refuse to take the estate, some other beneficiary shall receive it (Section 424). The testator may also impose upon the beneficiaries, on behalf of one, several, or all of the remaining heirs by operation of law, the performance of any obligations or the performance of an obligation of public benefit. This rule, stated in the original provisions of the Code (Section 423), was extended on June 12, 1945, to the effect that, if the beneficiaries are not relatives of the decedent and also his heirs by operation of law, the testator may impose upon them performance of an obligation on behalf of any person and not only on behalf of his legitimate heirs.

8. Opening of the Succession

An indirect limitation of the right of succession is further constituted by the short term for the presentation of claims.

Before discussing this point, a term used by the soviet Code and carried over from Roman law must be explained. This is the "opening of the succession" (Sections 424, 429–31, 433), which may be explained in conjunction with the general concept of devolution upon death under soviet law, following the traditional concepts of civil law countries derived from Roman law. In contrast to the common law, the soviet law construes descent and distribution without employing the concepts of personal representative of the decedent and public administration of his estate. The Roman idea of the heir as an immediate "universal" successor to the decedent forms the background of the soviet provisions; the heir, whether by will or by operation of law, is conceived as acquiring as a whole all the rights and liabilities, not strictly personal, of the decedent and continues, so to speak, the personality of the deceased. No differentiation is made between succession to personal and to real property.

The term "opening of the succession" corresponds to *delatio hereditatis* in Roman law and designates the initial moment of the succession, when the rights and liabilities of an individual become his estate subject to descent. Thus, by "opening of the succession" is meant the fact, or in former times the legal act, upon which the succession begins, viz., death, declaration of an absentee as dead, or civil death ensuing from condemnation to penal servitude or, in some jurisdictions, joining a monastic order. The concept is illustrated by Section 934 of the Louisiana Code, which is herewith reproduced by way of explanation:

> Section 934. The succession, either testamentary, or legal, or irregular, *becomes open* by death or presumption of death caused by long absence, in the cases established by law.

Likewise, under soviet law the succession is "opened" not only upon death but also upon declaration of an absentee as dead (Civil Code, Section 12). In the former case, death fixes the moment of opening of succession; in case of declaration of an absentee as dead, the date of opening is determined by the date of the certificate of the notarial office, or the date when the court order declaring the absentee as dead becomes final.[41]

The moment of opening of the succession is the point of reference in determining the group of heirs or beneficiaries called to the succession. Only those who are alive at this moment, as well as children of the decedent then already conceived, may inherit (Section 418, Note).

9. Acceptance of Estate: Indirect Limitation

The soviet Code requires acceptance of the inheritance on the part of the heir, whether he is a testamentary beneficiary or an heir by operation of law (Sections 429, 430). However, the acceptance does not have to be explicit in all instances. Heirs present "in the place of the opening" of the succession, who do not renounce their rights within three months after the opening, are considered to have accepted the inheritance (Section 429). The heirs present may also take the whole inheritance without awaiting the appearance of absent heirs (*id.*, paragraph 3). But an absent heir must explicitly declare his acceptance of the inheritance, in person or through an agent, within six months after the opening of the inheritance, otherwise, prior to June 12, 1945, his share was deemed to escheat and was forfeited to the State (Section 430). No notification to heirs of the opening of the estate, by publication or otherwise, is re-

[41] 2 Civil Law Textbook (1938) 452; 2 Civil Law (1944) 286.

quired under the Code (Section 431), and therefore this short preclusive term of six months constitutes an indirect limitation on succession rights. However, the Instruction for the Notarial Offices of November 17, 1939, Section 112, ordered the notarial offices which are charged with the taking of "measures of protection" of an estate "to advise the absent heirs if their addresses are known." [42] Moreover, the soviet Supreme Court has interpreted these statutory provisions in favor of the right of succession.

In the first place, renunciation of the estate involving escheat has been conceived strictly. Thus, renunciation of his share by one heir for the benefit of another heir was held to be a conveyance of such share and not renunciation. As stated by the Supreme Court:

> The renunciation of the succession contemplated in Section 429, paragraph 2 of the Civil Code, means a categorical and unconditional declaration of repudiation of inheritance, and therefore the declaration of one or several heirs renouncing their shares for the benefit of some other legal heirs should be either disregarded altogether or may be considered, subject to all other provisions of law, as a declaration of assignment of such shares to the other heirs, and by no means should it be treated as a repudiation of inheritance under Section 429, paragraph 2, of the Civil Code.[43]

Secondly, it has been held that the above-mentioned short six months' term established for the acceptance

[42] Instruction of the R.S.F.S.R. People's Commissar for Justice of November 17, 1939, Concerning Notarial Offices, Section 55; Notarial Offices (in Russian 1942) 26.

In the Ukrainian, Armenian, Georgian, and Uzbek republics, the six months' period runs from the date when the measures to protect the estate are taken, in others from the date of the opening of the succession, 2 Civil Law (1944) 303.

[43] R.S.F.S.R. Supreme Court, Plenary Session, Ruling of December 10, 1926, Protocol No. 20; Civil Code (1943) 227; 2 Civil Law Textbook (1938) 468.

of the estate by an absent heir is applicable only in cases where the estate is not taken in the interim by other heirs who are present or, in other words, where the State has taken the estate temporarily. But if the heirs present at the place of opening of the succession take the entire estate immediately into possession (under Section 429) or an unauthorized stranger does so, an absent heir has the right to sue for his share in the estate within the regular term of the statute of limitations, i.e., within three years.[44]

In line with these interpretations, the Edict of the R.S.F.S.R. Presidium of June 12, 1945, which purported to incorporate in the Civil Code changes ordained by two federal Edicts of March 14, 1945, introduced further alterations. At present, the share of an heir who has renounced his right or failed to present his claim in time does not escheat but devolves upon the other heirs by operation of law, unless the testator states that all his estate is bequeathed to the appointed heirs (beneficiaries) (new text of Sections 429, 430).

A certain ambiguity of language in the provisions defining "present" and "absent" heirs must be noted. In defining the former, Section 429 speaks of heirs "present at the place of opening of the succession," while the six months' term for acceptance of the estate is established for heirs "absent from the place where the estate is located" (Section 430). However, in many editions of the Civil Code, the words "place of the opening of the succession" are substituted for the latter terminology.[45]

[44] *Id.*, Ruling of April 19, 1926, Protocol No. 7; Civil Code (1943) 230; Nakhimson, Commentary 720. A similar ruling was issued by the Ukrainian Supreme Court on June 16, 1926, quoted in 2 Civil Law Textbook (1938).

[45] E.g., Nakhimson, Commentary 720; Malitsky 619; Alexandrovsky, Commentary to the R.S.F.S.R. Civil Code (in Russian 1928) 961.

The soviet textbook explains the discrepancy between Sections 429 and 430 as mere editorial oversight on the part of the framers of the Code.[46] It may well be so, and it seems that in practice absence from the place "of opening of the succession" has been read into Section 430. This, however, raises the question, what is the place of opening of the succession?

The original text of the Code contained Note 2 to Section 431, which reads:

> The place of the domicile of the deceased shall be considered the place of opening of the succession.

This note was repealed in 1930 without another definition being substituted in the text of the Code. However, the R.S.F.S.R. Rules Concerning Assessment of Inheritance Tax, Gift Tax, Etc. of October 30, 1929,[47] contained a more specific determination of the place of opening of the succession, namely, the domicile of the deceased as defined by Section 11 of the Civil Code.[48] These rules were issued in compliance with the federal Inheritance Tax Act of February 6, 1929, which was repealed by the Edict of January 9, 1943, abolishing the inheritance tax. However, a Statute of December 28, 1943, governing escheat gives the same definition.[49] If the domicile cannot be established, the succession is deemed opened at the place where the property of the decedent is located. The succession to a person who has

[46] 2 Civil Law Textbook (1938) 466; 2 Civil Law (1944) 286.

[47] R.S.F.S.R. Laws 1929, text 793, Section 12.

[48] Civil Code, 11. Domicile is the place of a person's permanent or principal residence by reason of employment, permanent occupation, or the location of his property.

The domicile of minors or persons placed under guardianship is deemed to be that of their legal representatives (parents, parents by adoption, guardian, or curator). (As amended November 14, 1927, R.S.F.S.R. Laws, text 770.)

[49] R.S.F.S.R. Laws 1944, text 21, Sections 4, 5; 2 Civil Law (1944) 286. For translation of this law, see Vol. II, No. 2, comment to Section 433.

died abroad is considered opened at his domicile within the U.S.S.R. and, if he had none there, at the place where the estate is located.

In the case of a person declared dead, the succession opens at the place of his last known domicile.[50]

Provision has been made for suspension of the running of the six months' term for acceptance of inheritance during the war emergency.[51]

Heirs who have accepted an inheritance are liable for the debts of the estate only to the amount of the value of their respective shares in it (Civil Code, Section 439). Creditors must file their claims within six months from the opening of the succession, but the Code does not say where these claims must be filed (*id.*, Note).

10. Wills

Neither the Civil Code nor any other statute sets forth any specific requirements for capacity to make a will. Therefore, the soviet jurists deem any person who is generally competent to enter into legal transactions (Civil Code, Section 8) capable of making a will. Thus, minors under the age of eighteen years and persons adjudged unable to manage their affairs because of mental disease or weak-mindedness do not have testamentary capacity. Likewise, a will executed by a testator while "in a state of mind which precluded his understanding of the significance of his acts," has no validity (Section 31).[52]

A will must be made in writing, signed by the testator, presented by him in person at the notarial office, there

[50] 2 Civil Law Textbook (1938) 452, 453.

[51] See Vol. II, No. 2, comment 3 to Section 433.

[52] 2 Civil Law (1944) 293; 2 Civil Law Textbook (1938) 457; Zimeleva, Civil Law (1945) 325.

certified, and entered in the official record (Section 425). In lieu of the signature of an illiterate testator, the will must be signed by a third party to whom no property is bequeathed under the will.[53] At the time when the will is certified, the notary determines whether or not the will is contrary to law. The testator is given a certified copy of the entry made in the notary's official records, which copy may serve instead of the original will. Neither holographic nor privately made wills are recognized by the soviet law.

The wills of soviet citizens made abroad may also be certified by the consuls and consular agents of the U.S.S.R.[54] A captain of a seagoing vessel may certify during the voyage wills made by persons on board, and a captain of a riverboat may certify wills of persons on board.[55] Since September 15, 1942, commanders of military units (regiments, battalions, companies, batteries, and the like) may certify wills of men in their units, and heads of hospitals may certify wills of servicemen treated therein.[56]

A testator may revoke his will without making a new one, by filing a declaration at the notarial office (Section 426). A will drawn subsequently cancels a previous will. The dispositions of the previous will, not affected by the new one, remain in force. The carrying out of the will devolves upon the beneficiaries. The appointment of a special executor is allowed, but his consent thereto must be stated in the will or in a separate declaration appended to the will. (See *infra* 11).

No soviet statutory provisions deal specifically with

[53] Instruction of the R.S.F.S.R. People's Commissar for Justice of November 17, 1939, Concerning Notarial Offices, Section 55, *op. cit.*, note 42.
[54] Consular Statute, U.S.S.R. Laws 1929, text 567, Section 60.
[55] *Id.*, text 365, Section 59; *id.* 1930, text 582, Section 27.
[56] *Id.* 1942, text 133.

wills made abroad disposing of property located in the Soviet Union. Under the general rule stated in Section 7 of the Code of Civil Procedure, the soviet courts, in examining documents made abroad, shall take into consideration the laws of the place of making, provided that such documents are permitted under the soviet law or international treaties entered into by the Soviet Union. Thus, it seems that according to the maxim *locus regit actum* at least the form of wills made abroad should be governed by the law of the place of making. However, two different opinions were recently voiced by the soviet jurists. The authors of the textbook on conflict of laws of 1940, Peretersky and Krylov, think that:

> Not every will made abroad may be recognized in the Soviet Union from the point of view of form. We recognize as a will only written documents certified by a governmental institution—a notarial office (Sections 422 and 425 of the R.S.F.S.R. Civil Code); oral dispositions and privately executed instruments are not wills under our law. Therefore, a will made abroad may be recognized as valid in the Soviet Union as far as form is concerned only in the event that it appears to be an incontestable document, i.e., is certified by a court or governmental agency in accordance with the rules of foreign legislation concerned.[57]

Lunts, the author of a recent monograph on the conflict of laws on inheritance, is of a different opinion. He believes:

> The requirement of Section 425 of the Civil Code making notarization of a will mandatory may not be applied to testaments executed abroad if their form complies with the law of the place of execution; the provisions of Section 7 of the Code of Civil Procedure furnish sufficient grounds for such point of view.[58]

[57] Peretersky and Krylov 161. Concerning the application of the maxim *locus regit actum*, see also Chapter 23, II, 11.

[58] Lunts, "Problems of the Conflict of Laws with Respect to Inheritance" (in Russian 1940) Soviet State No. 8/9, 148.

All these writers think that a will made abroad but relating to property located in the Soviet Union may be recognized as valid if its provisions conform to the soviet law as respects persons eligible to be beneficiaries and limitations on the freedom of the testator, unless an international agreement provides otherwise. Krylov and Peretersky do not refer to any court decision in support of their opinion. Lunts refers to Section 7 of the Code of Civil Procedure. The same author goes so far as to claim that if part of the estate of an alien who dies on soviet territory is located in the Soviet Union and part abroad, all of it should come under the soviet law, because under that law the whole of the estate is regarded as a unit.[59] In view of the restrictive character of the soviet provisions governing testate succession, the danger involved in such an interpretation needs no comment.

11. Administration of Estates

As has been mentioned elsewhere, the soviet law, like the law of many civil law countries, construes descent and distribution without employing the concepts of personal representative and public administration of a decedent's estate. The right and duty to administer the estate, and in particular to pay the creditors, devolves directly upon the heirs or beneficiaries, as the case may be. Only if the heirs and beneficiaries cannot be located at once do the authorities, viz., the notarial offices, intervene in order to ascertain who they are and in order to protect the estate. This is the purpose of the proceedings known as the taking of measures for the protection of the estate (Civil Code, Section 432). These

[59] *Id.* 147.

measures are taken by the notarial offices; in the Byelorussian, Uzbek, and Azerbaijan soviet republics, by the people's courts.[60] They consist primarily in taking an inventory and depositing cash, and especially foreign exchange, with the U.S.S.R. State Bank.[61]

A curator may be appointed if there is property which needs management. But such a curator is in no way comparable to an administrator; he manages the property entrusted to him and does not distribute the estate. The testator may appoint an executor in his will, but the consent of the person so appointed must be stated in the will or appended thereto.

After the expiration of six months from the opening of the succession (see *supra* 8), a certificate is issued to the heirs attesting their succession rights. Prior to the expiration of this period, such certificate may be issued only if all heirs and beneficiaries are present. The heirs must present for this purpose all documentary evidence of the fact of death and of relationship to the deceased, or the will.[62] A governmental fee is charged for the issuance of such certificate, amounting to from 10 to 100 rubles for estates of a value of not more than 5,000 rubles, 5 per cent of the value of the estate, if the estate amounts to from 5,000 to 10,000 rubles, and 10 per cent of the value if the estate is valued at 10,000 or more rubles.[63]

12. When the Estate Escheats

The State becomes the owner of the estate or shares in it by escheat in the following cases:

[60] 2 Civil Law (1944) 312.
[61] See Vol. II, No. 2, comment 3 to Section 433.
[62] Instruction of the R.S.F.S.R. People's Commissar for Justice of November 17, 1939, Concerning Notarial Offices, Sections 115–124, *op. cit.*, note 42.
[63] U.S.S.R. Laws 1942, text 71.

(a) Where there are no heirs authorized to take the estate. Prior to March 14, 1945, the State took the estate in the absence of direct descendants, surviving spouse, or disabled dependents. Even then, narrow exceptions were admitted. The Rules of 1929 for Assessment of the Estate Tax stated that such property of deceased minors in working families (except those classed as kulaks) as was used by them jointly with other members of their families does not escheat but descends to such members.[64] In 1934, the Commissariat for Finance ruled that the same applies to the savings accounts of minors.[65] The succession reform of 1945 introduced substantial changes. Equally with descendants, surviving spouse, and disabled dependents, disabled parents may inherit; in their absence, able-bodied parents, and, in their absence, brothers and sisters, may inherit. In the absence of these classes of persons, any person appointed as heir by will may take the estate. Consequently, only in the absence of the above statutory heirs and heirs by will does the estate escheat.[66]

(b) In addition to the changes under the federal Edict of March 14, 1945, further changes were enacted by the R.S.F.S.R. Edict of June 12, 1945, although it was issued merely to codify the provisions of the former. Prior to June 12, 1945, the language of Sections 429 and 430 of the Civil Code left no doubt that the share of an heir or a testamentary beneficiary escheats: (1) if he renounces his succession rights (see *supra* 9); (2) if he is absent and fails to present his claim within six months,

[64] R.S.F.S.R. Laws 1929, text 793, Section 67.

[65] 2 Civil Law Textbook (1938) 453.

[66] Civil Code, Section 433 as amended June 12, 1945, also R.S.F.S.R. Laws 1944, text 21, Section 1 as amended by the Act of March 7, 1946, R.S.F.S.R. Laws 1946, text 16. For a translation see Vol. II, No. 2, comment to Section 433.

his share being taken by the State and not by other heirs or strangers; and (3) if the testator deprives some of the heirs of the succession and fails otherwise to dispose of their shares. The language of these sections was changed to the effect that, should an heir renounce his inheritance, fail to present his claim in time, or be deprived of succession by the testator, the unclaimed share devolves upon the heirs by operation of law. Should the testator make clear his wish that all his estate be distributed among his beneficiaries, such vacant share goes to them.

13. Disqualification of an Heir

Although the soviet Code does not contain any provisions disqualifying an heir for moral reasons, one rule of this nature has been established by the R.S.F.S.R. Supreme Court. Referring to the essence and the basis of the right of succession, the court held:

> Intentional murder of the decedent punishable under the Criminal Code deprives the perpetrator of the murder of the right of succession to property of the murdered.[67]

Thus, the centuries old rule, known in Roman law as the *senatus consultum Macedonianum,* has been recognized by the soviet court.

V. Special Kinds of Descent

1. Marital Community Property

According to the Code of Laws on Marriage, Family, and Guardianship, "the property belonging to each spouse before marriage is separate property. Property

[67] R.S.F.S.R. Supreme Court, Plenary Session, Ruling of June 7, 1926, Protocol No. 9; Civil Code (1943) 227; 2 Civil Law Textbook (1938) 457; 2 Civil Law (1944) 292.

earned by the spouses during the marital state is common property of both spouses." [68] Whenever the marital state comes to an end by divorce or by decease of one spouse, this common property is to be distributed. Thus, in case of death, the surviving spouse is entitled to his or her share in the common marital property, in addition to sharing in the estate. The share of the surviving spouse does not belong to the estate and, consequently cannot be disposed of by will. "A will made by the deceased spouse regarding the entire community property may have effect only as respects the property forming the share of the testator." [69] The size of the share of each spouse depends upon the circumstances of the case; prima facie it is one half and, if contested, must be determined by the court.

The community property of husband and wife common to Western Europe is a new institution in the Russian law and is discussed at length in Chapter 4, I, pp. 132–134.

2. Inheritance in Farming Families

The law of inheritance as outlined in the Civil Code has only limited application to farming families. Like the peasant household under imperial law, the farming household under soviet law carries its prerevolutionary features as a unit with a community property of its own kind, regulated by the Land Code and not the Civil Code. In contradistinction to joint ownership (Civil Code, Sections 61–65), a member of the farming household has no definite share in the common property but an indefi-

[68] R.S.F.S.R. Code on Marriage, Etc. of 1926, Section 10. See Vol. II, No. 3. Similar provisions are to be found in the codes of other republics.
[69] R.S.F.S.R. Supreme Court, Civil Appellate Division, Decision (in Russian 1928) Judicial Practice No. 22.

nite share in the community use of it. He simply enjoys such benefits and comforts as the common life of the household can offer.

Only the strictly personal ownership of a farmer, defined as "property proved to have been acquired by his personal means or property considered to be personal belongings under local customs" (Land Code, Section 77), constitutes his estate and descends under the Civil Code. A farmer may by will dispose of this property only. But property incidental to farming (buildings, right of toil tenure of land, implements, livestock, fowls, and the like) is considered to be in the joint undivided ownership of the entire farming household, of all its members, including relatives by blood or strangers working and living under the same roof. "The membership increases by marriage, birth, and informal adoption of strangers and decreases by severance of a member or his death. But the share of a deceased member remains in joint ownership and does not descend by inheritance." [70]

These rules are based upon the provisions of the Land Code enacted before the collective farms became the prevailing type of farming in Soviet Russia. That these rules still apply to the few farming families that did not become members of collective farms, is beyond doubt. However, inheritance in case of the families of members of collective farms is controversial. An independent farming family carries on all its business jointly. On the other hand, the membership in a collective farm is individual, as is the distribution of collectively obtained income from such farm. Every member of a household

[70] 2 Civil Law Textbook (1938) 474; R.S.F.S.R. Land Code of 1922, Sections 66, 67, 72. The concept of the farming household is discussed at length in Chapters 18 and 21.

belonging to a collective farm receives his own share in this income personally in proportion to his own labor. This share consists of a definite sum in cash and a quantity of products in kind. But the house-and-garden plot appurtenant to the dwelling is assigned to a household, not to an individual. Likewise, the house itself is the property of the whole family. Each farming household belonging to a collective farm not only participates in the collective work but also is allowed to conduct its own husbandry on the house-and-garden plot assigned to it. The farming property on the house-and-garden plot, though small, may be substantial, e.g., there might be one cow, two calves, pigs, and fowls. This farming is conducted on the old-fashioned family basis.

There is no statute dealing with inheritance in the case of families belonging to the collective farms. The R.S.F.S.R. Supreme Court has ruled that the share received by each member of such a family from the collectively obtained income of the farm, according to the so-called "labor days" credited to him, constitutes his personal ownership. It comes under the Civil Code and descends in accordance with Sections 416–435 of the Code.[71]

No decision is available with regard to property pertaining to the farming of the family on its house-and-garden plot. At the beginning of collectivization, some writers expected that the farming household would be absorbed by the collective farms (Stuchka, Diakov)[72] or at least that the old concept of the peasant household

[71] R.S.F.S.R. Supreme Court, Presidium Resolution of March 3, 1932 (1932) Soviet Justice No. 14, 32.

[72] Stuchka, "General Principles of Land Tenure" (in Russian 1928) Revolution of Law No. 3, 12; Diakov, Problem of Inheritance in the Collective Farms (in Russian 1930) 21–22. See Chapter 21.

could not be applied to such families as joined the collective farms (Rosenblum, Evtikhiev).[73] Yet with the growth of the collective farms, the independent farming of family households within such farms did not show any tendency to disappear. Though unwelcome, household farming has been allowed within the collectivized system, because it proved to be indispensable. But no legislation has been enacted defining the relations of members of the household in the new situation. Is such a household still regulated by the Land Code or, if it is in joint ownership, does it come under rules of co-ownership, provided by the Civil Code? The question is complicated by the fact that, conceivably, the members of the household may contribute their personal shares of collectively obtained income to the development of the individual farming of the household to which they belong. Do such contributions merge in the joint property of the household without creating any advantage for the contributors?

The textbook on the law of collective farms of 1939 states somewhat vaguely that "Sections 61 *et seq.* of the Land Code still characterize to a large extent the household in a collective farm."[74] A similar textbook of 1940 says more cautiously that "these rules may be used within certain limits in defining the legal status of a household belonging to a collective farm."[75] These statements are followed by lengthy discussions of the specific economic position of the household in a collective farm. The general aim of all the legislation concerning collective farms is to keep the farming of the household

[73] Rosenblum, Land Law of the R.S.F.S.R. (Russian 3d ed. 1929) 270; Evtikhiev, Land Law (Russian 2d ed. 1929) 282–283. See Chapter 21.

[74] Law of Collective Farms (in Russian 1939) 343.

[75] Law of Collective Farms (in Russian 1940) 305–306.

within certain limits, reducing it to the status of an auxiliary source of subsistence of the household, while maintaining participation in the collective farm as the chief source. However, the legal writers fail to indicate which of the old provisions concerning the household are applicable in the new scheme. Regarding the inheritance, the textbooks agree that "after the death of a member of a household belonging to a collective farm, no succession to any portion of the undivided property of the household takes place." [76] Only in case the household consists of one sole person, then according to the Instruction to the Notarial Offices of 1939 (Sections 126, 127) a succession opens under the provisions of the Civil Code.[77] Otherwise, according to the textbook on civil law of 1944, "no succession takes place upon death in a farming household; merely is its membership diminished. . . . The share of the deceased is not separated from the undivided joint property of the household but remains in the undivided use of the surviving members." [78] Many other problems have been raised by the soviet legal writers but have remained thus far unanswered.[79]

VI. Recapitulation

The outcome of the development of the soviet law of inheritance strongly argues for inheritance as an indispensable legal institution of an organized society. The right of succession must be deeply rooted in the human

[76] *Id.* (1940) 312; *cf. id.* (1939) 352.

[77] Instruction of the R.S.F.S.R. People's Commissar for Justice of November 17, 1939, Concerning Notarial Offices, *op. cit.*, note 42 at 40.

[78] 2 Civil Law (1944) 279, 283.

[79] Orlovsky, "The Household in the Collective Farm" 2 Problems of Socialist Law (in Russian 1927) 10; Steinberg, "Legal Relations of the Farming Household" (in Russian 1938) Soviet Justice No. 20/21; Law of Collective Farms (in Russian 1939) 342.

mind to withstand, as it did, the challenge included in the original provisions of the soviet laws and the teachings of the soviet legislators and jurists. They did not regard this right highly and expected to get along without it. The early soviet enactments denied succession rights, and the recent attempts of the soviet jurists to minimize the denial show only the change in their attitude toward inheritance. But such retrospective new interpretation cannot eliminate the clear language and well-expressed intention of the early soviet law directed against inheritance.

Succession rights were admitted in 1922 as a compromise. Inheritance was allowed with several restrictions affecting the right of the citizen to dispose of his property by will, limiting the size of the estate subject to descent and distribution, and later subjecting it to a heavy progressive tax. Only the surviving spouse, the descendants, and actual dependents of the decedent were allowed to take his estate in testate or intestate succession. Moreover, the provisions of the Civil Code have created numerous occasions for escheat of the estate. Although the traditional terminology was used in drafting the pertinent provisions of the Civil Code, the old terms acquired in soviet law a new meaning. For example, under Section 422 of the Civil Code prior to 1945, a testament under the soviet law appeared to be merely a redistribution of shares in the estate among the persons who in any event take his estate by operation of law.

However, since the compromise of 1922, the soviet law exhibits a tendency to remove gradually the restrictions imposed upon inheritance and to revert to traditional concepts. The declaration of socialism achieved in the Soviet Union, which was made in the 1936 Constitution,

did not stop but, perhaps, even accelerated this process. The courts have shown a strong inclination to interpret the restrictive statutory provisions in favor of succession rights. Apparently, the practical injustice of some provisions became more evident in the application of abstract rules to actual human relations. Recent statutes have shown the same tendency and gradually have introduced century-old concepts into the soviet law of inheritance. As a result, the present soviet law of testate and intestate succession may be to a large extent explained and interpreted in terms of the inheritance law of civil law countries. Together with the change of statutory provisions, a change in doctrine, in ideology and philosophy, is in evidence. The soviet jurisprudential writings as of 1945 have traveled since 1923 a long road back to traditional concepts. Elimination of collateral relatives other than brothers and sisters in intestate succession and in testate succession in the presence of descendants, ascendants, and the spouse, as well as rigid formalities of a soviet testament, seem to be at present the only striking remnants of the numerous restrictions imposed originally in soviet law upon the right of succession. Even in this respect, a backdoor to free disposal is open by permitting the depositors of money or governmental bonds in the soviet banks to assign their deposits to any person of their own choice.

Thus, no restriction upon the accumulation of private wealth flows from the soviet law of inheritance. This does not mean that no such restrictions exist under the soviet law. There are strong and rigid restrictions, but these are to be found outside of the law of inheritance in other sections of soviet law. They are rooted in the general structure of the soviet social order, barring pri-

vate capital from legitimate and profitable avenues of activities. They are fully expressed in the constitutional provisions and in the soviet law of property. The present soviet law of inheritance is an attempt to reconcile a social order which prohibits productive employment of private capital with the traditional concepts of succession rights, which protect accumulation of private wealth by descent.

Chapter 18

Presoviet Agrarian Legislation

I. Preliminary

The abolition of private ownership of land has been a constant principle of soviet law, declared by the first soviet decree, stated in the first soviet Constitution of 1918, and restated in the latest Constitution of 1936. However, it is in itself no guide for the understanding of land tenure in Soviet Russia. Except for the dispossession of the owners of large estates without indemnity, which actually began under the Kerensky government and was sanctioned under the soviet regime, soviet legislation regulating land tenure has fluctuated. For a long period of time, until 1929, the land tenure of Russian peasants was a direct offshoot of some forms of the tenure of land characteristic of the imperial regime. The present legal status of a household in a collective farm is also based on some legal concepts which regulated the tenure of land by peasants in imperial Russia. The soviet agrarian legislation consists at present of a large number of provisions in numerous enactments that originated in various periods of the soviet regime and can be understood only in the setting of their times. The present chapter seeks to offer an historical introduction for the law of collective farms, which eventually became the predominant form of land tenure in the Soviet Union.

Land tenure was left unprovided for in the soviet Civil Code of 1922, the regulation of this subject matter

being reserved for a separate code.[1] As a matter of fact, the Civil Code of the R.S.F.S.R. was briefly antedated by the promulgation of a Land Code. It was adopted on October 30, 1922, and took effect on December 1 of the same year. Analogous land codes were adopted for the Ukraine, Georgia, and Byelorussia.[2]

Many of the substantial provisions of the land codes followed the prerevolutionary law. Moreover, a back door was left open for the application of the previous law. Thus, Sections 8 and 55 of the R.S.F.S.R. Land Code allowed the peasant communes to resort, in questions of land tenure, to such "local customs as are not in contradiction with the law." Section 77 referred to local customs for determination of certain questions connected with the dissolution of peasant households. The soviet jurists realized that, in the form of local customs, the prerevolutionary legal concepts gained recognition. Stuchka, at one time Commissar for Justice and later Chief Justice states:

> We overcame the written law of the imperial regime easily, and yet the old law was quite persistent in the form of customary law. It is still dominant among the peasants, though it is losing its power; we recognize it there wherever it appears inconsequential from the viewpoint of our revolutionary law and whenever peasants do not want to give it up voluntarily.[3]

Consequently, the land codes did not show such a complete break of continuity with the presoviet law as might be supposed or as is suggested by Section 6 of the Law Enacting the Civil Code.

[1] Civil Code, Section 3.

[2] R.S.F.S.R. Laws 1922, text 901. The Ukrainian Land Code was passed on November 29, 1922; the Georgian on May 15, 1924; the Byelorussian on February 24, 1925; Land Law (in Russian 1940) 53.

[3] Stuchka, 1 Course (in Russian 1927) 175–176 (2d ed. 1931) 188; Polianskaia, "The Role of Custom in Property Relations of a Peasant Household During the November 1917 Socialist Revolution" (in Rus-

Again, certain principles were carried over into the land codes from earlier soviet decrees inspired by the doctrine of the so-called socialization of land. This was the doctrine of the political rivals of the communists.

Although the land codes of the soviet republics were never repealed, only a few of their provisions are still in effect. First, their provisions were to a great extent superseded by the Act of 1928 called the Basic Principles of Land Tenure and Land Organization.[4] Then, the firm policy of wholesale collectivization of farming, adopted since 1930, has resulted in a large number of new federal laws and decrees, which have completely overshadowed this act. On the eve of the great German invasion in 1941–1942, land tenure by collective farms was the predominant form of land tenure in Soviet Russia. The Standard Charter of an Agricultural Artel (Collective Farm), enacted in 1930, and completely revised in 1935,[5] is the fundamental piece of legislation regulating agriculture in the Soviet Union. Therefore, a complete translation has been made of the Standard Charter of 1935 (with its subsequent direct and some indirect amendments), while from the Land Code only such provisions as may still be applicable have been selected for translation. This material is placed in Volume II; the present chapter offers a survey of the Russian presoviet agrarian legislation beginning with the abolition of serfdom in 1864; the following chapter traces the development of soviet agrarian legislation, while Chapter 20 systematizes the statutory provisions concerning collective farms, and Chapter 21 discusses the status of a peasant household in a collective farm.

sian 1941) Soviet State No. 1, 40–57; *id.*, Land Law (in Russian 1947) 20.

[4] U.S.S.R. Laws 1928, text 642.

[5] U.S.S.R. Laws 1930, text 255; *id.* 1935, text 82.

II. Peasant Land Tenure Before the Revolution

1. Prerevolutionary Forms of Tenure

On the eve of the revolution, the Russian peasantry as a class was the largest private owner of agricultural land in European Russia, i.e., Russia west of the Ural Mountains, which contained 80 per cent of the Russian population. Approximately four fifths of such privately owned land was the property of the peasants.

The vast spaces of Russia and inadequate land statistics have obscured the true interrelation between the peasant holdings and the large estates, on the eve of the revolution. Due to the climatic conditions, especially the shortness of the vegetation period in the North and insufficient precipitation in the South and East, only a small portion of Russia's territory is suitable for farming. While the peasant holdings embraced only the useful land, the governmental and public lands were of no agricultural significance, and a large portion of the former manorial estates consisted of forests and was also devoid of immediate agricultural value. But this situation was not duly accounted for in the censuses which were taken at irregular intervals (1877, 1887, 1905, 1916) each following a different program. In addition, the land owned by the peasants in fee simple was classed prior to 1905 with that occupied by the former manorial estates, these forming the general legal category of "land owned in fee simple." In brief, the actual distribution of land suitable for agriculture had to be computed, and the 1905 census gave for the first time primary data for such computation. But the computations by the soviet and the nonsoviet scholars are practically unanimous and very close to the percentage given above.[6]

[6] All computations are concerned with European Russia alone, where 80

However, only a small portion (about 20 per cent) of land owned by the peasants in European Russia was held by individual peasants in fee simple.[7] The balance was the so-called "allotted" land, which was given to the peasants who had been serfs after the abolition of serfdom in 1861.[8] It is easier to describe the peculiar status of this land than to express it in terms of American property law.

per cent of Russians lived and which was the only area with a congested agricultural population.

According to Timoshenko, Agricultural Russia and the Wheat Problem (Stanford University 1932) 58, in European Russia, excluding North Caucasus and territory occupied by the Germans in 1916, the large estates (former manors) possessed 10.7 per cent of the crop acreage and peasants 89.3 per cent. In the zone north of the Black Sea, the large estates had only 4 per cent and in Northern Ukraine 20.3 per cent. According to Chelintsev, "The Large Estate Farming in Russia Before the Revolution" (in Russian), Transactions (*Trudy*) of the Institute for Study of Russia (Prague) 9 *et seq.*, in all European Russia, the peasants possessed from 77 to 79 per cent of the crop acreage and pasture and the landowners from 23 to 21 per cent. Similarly Volin, "Agrarian Individualism in the Soviet Union" (1938) 12 Agricultural History 16–17. Soviet writers estimate the ratio of land owned by peasants at 73.32 per cent for 49 provinces (out of 60) and at 76.3 per cent for 32 provinces. Latsis, Agrarian Overpopulation (in Russian 1929) 11; Timofeev, Economic Geography of Russia (in Russian 1927) 36, 37. See also Oganovsky, Outline of Economic Geography of Russia (in Russian 1922) 77–80. Differences in the number of provinces covered are explained by the fact that the above-quoted soviet writers were primarily interested in the territory of the R.S.F.S.R. alone. The tabulation by Professor Geroid T. Robinson, Rural Russia Under the Old Regime (London and N. Y. 1932) has not been reproduced here because it deals with the total area, including forest and land unsuitable for farming.

[7] Chelintsev, *op. cit. supra*, note 6 at 9, 15. See also Timoshenko, *op. cit. supra*, note 6 at 54; Oganovsky, *op. cit.*, note 6 at 105, 106; Khauke, Peasant Law (in Russian 1913) 33.

[8] Allotted land was defined as "land given to peasants on the ground of the emancipation laws of 1861," (Ruling Senate, Plenary Assembly, Decision of 1914, No. 7) or "Such tracts of land as have been assigned to peasants under special enactments settling land tenure of peasants, in fee simple or in perpetual use to secure the welfare of the peasants and performance by them of their obligations towards the government and their former manorial lords" (Ruling Senate, Plenary Assembly, Decision of 1902, No. 27). The Senate supported the definition by reference to Section 3 of the General Statute on Peasants, Section 5 of the Local Statute on the Peasants in Great Russia, and Section 1 *et seq.* of the Redemption Statute. See Leont'ev, Peasant Law (in Russian 1909) 296; Boshko, Legal Capacity of a Peasant with Regard to Land Tenure (in Russian 1917) 15, See also note 19 *infra*.

Originally, peasant land tenure was but barely outlined by the several emancipation acts of 1861, each of which covered a limited territory and category of peasants.[9] These acts show that their framers visualized the peasant land tenure in the future as unrestricted private ownership,[10] but they left intact the customary joint tenure of land by peasant communes as it existed at the time.[11] Furthermore, because the peasants had to com-

[9] There was one general act, the General Statute Concerning Peasants Emancipated From the Bondage of Serfdom, and several local acts, so-called because they regulated the reform in a given large area. These were:

(a) The Great Russian, applicable in thirty-five provinces of Great (i.e., Central) Russia, three provinces of Novorossiya (South Russia), and two Byelorussian provinces (Western Russia-Mogilev and Vitebsk). It was extended also to the Don Region and Siberia.

(b) The Ukrainian statute for the provinces of Chernigov and Kiev and part of Kharkov.

(c) Two other statutes issued for Polish Lithuanian provinces of Ukraine and Byelorussia were superseded after the Polish rebellion of 1863 by the Rules of Abolition of Bondage of Peasants in Nine Western Provinces of 1867.

The land tenure of crown peasants (see *infra*, p. 667 at note 12) was regulated by a separate Statute of November 24, 1866, for thirty-six central provinces and a statute of 1867 for nine Western provinces.

There was also a separate statute on redemption, of 1863, which was amended several times.

All of these statutes as modified by subsequent legislation were codified in Svod Zakonov, the General Code of Laws of the Russian Empire, as a Special Appendix (*Osoboe Prilozhenie*) to Vol. IX, 1876 edition, under the title, "Statute on Rural Population" (*Polozhenie o sel'skom sostoianii*). Each act formed a book of the statute with separate numbering of sections. An officially revised and amended edition of the whole appendix appeared in 1902. A later revision with amendments of some parts was printed in 1912, 1913, and 1914.

Several profusely annotated editions were put out by *Zemskii Otdiel*—Division of Peasant Affairs of the Department of the Interior, the last being issued in 1916.

The Statute governing the tenure of peasants settled on the land of the imperial family (*udel'nye*) of July 26, 1863 (Second Complete Collection of Imperial Laws, text 32, 792) was not incorporated into Svod Zakonov. See Leont'ev, *op. cit. supra*, note 8 at 179, 242, 254.

[10] Section 156, Redemption Statute (1876 ed.), Section 106 as revised in 1902. See Boshko, *op. cit. supra*, note 8, at 23.

[11] The time of origin of the peasant commune is a controversial problem. Certain scholars (Haxthausen, Tengoborski) have ascribed the origin of the modern commune to the aboriginal past. The other extreme opinion advanced by Chicherin denies any connection between the patriarchal com-

pensate the landowners for the "allotted" land, restrictions upon the free disposal of land by individual peasants and their communes were imposed to secure collection of the redemption payments and of the taxes for which the landowners had theretofore been responsible.

mune and that in operation after the emancipation; the latter was to a great extent created by the measures taken by the government beginning with the sixteenth century. Others have put forward a compromise opinion. According to this view, the rural commune is an ancient institution which survived to the time of emancipation; the government accepted, but did not create it and yet adapted the commune for its own purposes of fiscal and social policy.

The study of the Russian commune was opened by Haxthausen, Studien über die inneren Zustände, das Volksleben und insbesondere die ländlichen Einrichtungen Russlands, 3 vols. (1847–52) and Tengoborski (Tegoborski) Essai sur les forces productives de la Russie, 4 vols. (1852–58). Its English translation: Commentaries on the Productive Forces of Russia (1855–1856) 2 vols. The chief works are: Chicherin, Essays in the History of Russian Law (in Russian 1858), also as articles in Russkii Viestnik (1856) bk. 3, 4, 12–13; Beliaev, Peasants in Russia (in Russian 1st edition 1860); Lieshkov, "Communal Tenure" (in Russian 1867) Iuridicheskii Viestnik No. 6; *id.*, "Private Land Tenure" (1871) *id.* No. 2; Soloviev, S. M., "The Origin of the Commune" (in Russian 1866) 6 Russkii Viestnik 285; Kavelin, 2 Collected Works (in Russian 1898); Sokolovskii, P. A., Outline of the History of the Rural Commune in the North of Russia (in Russian 1877); *id.*, Economic Life of the Rural Population of Russia (in Russian); *id.*, Colonization of the South Eastern Steppes Before the Establishment of Serfdom (in Russian 1878); Pobedonostsev, 1 Course of Russian Civil Law (in Russian 1871) 465 (1896 ed.) 540 *et seq.*, *2 id.* 151; Diakonov, Outline of the History of the Rural Population in the Muscovite State (in Russian 1898); Nikitsky, History of Economic Life of the Great Novgorod (in Russian 1893); Sergieevich, 3 Antiquities of Russian Law (in Russian 1902–1903) 423 *et seq.*; Milukov, Outline of Russian Culture (Russian 5th ed. 1903–1905, 3 vols.; also Paris 1930–1937, 3 vols., translated into English); Efimienko, Peasant Land Tenure in the Far North (in Russian); *id.*, Sketches of the People's Life (in Russian); Izgoev, Peasant Community Law (in Russian 1906).

Comparative Studies, Kovalevsky, Modern Customs and Ancient Law in Russia (1891); *id.*, Communal Land Tenure (in Russian); Luchitsky, Peasant Land Tenure in France (in Russian); Ziber, Primitive Civilization (in Russian); Maine, Village Communities in the East and West (1871); *id.*, The Early History of Institutions (1875); Maurer, Einleitung zur Geschichte der Mark-Hof-Dorf und Stadt-Verfassung (1854); *id.*, Geschichte der Markenverfassung in Deutschland (1856). For an analysis of the literature, see also Leont'ev, *op. cit. supra*, note 8 at 262 *et seq.*; Izgoev, *op. cit. 77 et seq.* and literature given there.

The statutory provisions concerning "allotted" land were far from being precise and complete and left room for the application of local customs. This called for amendatory legislation, and a series of laws was enacted in the last decades of the nineteenth century, extending various restrictions and seeking to uphold the communal regime in order to keep the peasants from losing their land. Moreover, the Ruling Senate, the Supreme Court of Russia, sought to fill the gaps in legislation and to crystallize peasant customs. Thus, peasant land tenure became regulated to a great extent by case law in addition to statutes and customs. The outline given below is derived from all three sources.

The specific rules established for "allotted" land were not applied to land purchased by peasants from their former masters or other persons after 1861. Such purchased land constituted an outright private ownership in the purchaser, subject to the general provisions of the law of real property laid down in the Civil Code of imperial Russia (Vol. X of the General Code of Laws—*Svod Zakonov*).

After the abortive 1905 revolution, the status of allotted land was changed. Unpaid balances of redemption payments were cancelled. New legislation sought to remove restrictions upon the free disposal of the allotted land, to stimulate voluntary dissolution of the peasant communes, and to make the possession of allotted land more like private ownership. This was the so-called Stolypin reform. Consequently, three forms of peasant land tenure existed on the eve of the revolution: (1) tenure of allotted land under the laws antecedent to the Stolypin reform; (2) tenure of allotted land as modi-

fied by the Stolypin reform; (3) ownership of purchased land.

The ownership of purchased land was abolished in the course of the revolution and had no bearing upon land tenure under the soviet regime. Therefore, further discussion will be limited to the tenure of allotted land alone.

2. The Emancipation Reform

(a) *Land allotments.* With the emancipation in 1861, peasants received not only personal freedom but also land from the estates upon which they were settled. The size of such allotments varied in different parts of Russia. The general purpose was to allocate to a peasant family an acreage commensurate to its working strength and sufficient for its self-support.[12] The allocated acreage was, as a rule, calculated according to an established local standard per male, the average being about thirteen acres, or forty acres per family.

This average gives only a general idea of the size of a peasant holding in 1861. The law established a variety of local standards with minimum and maximum standards for each locality. The standards depended upon the density of the rural population in a given district and estate. Moreover, the peasantry was not a uniform class on the eve of emancipation. There were three main groups, each having a different status. The acreage apportioned to a farmer was determined not only by the locality where he was settled but also by the fact that he belonged to a particular group of peasants.

[12] This principle was proposed at and accepted by the second session of the committee for drafting of the reform in October, 1858. See 1 First Edition of Materials of the Drafting Committees of a Statute for Emancipated Peasants (in Russian 1859) 5, also Leont'ev, *op. cit. supra,* note 8 at 169.

Only one group of peasants could properly be called serfs. These, the so-called private serfs (*pomeshichyi krest'iane*), were peasants settled on manorial estates under personal bondage to the lord of the manor as manorial serfs; they numbered from ten to thirteen million males and constituted slightly less than one half of the total agricultural population in 1861. Land was allotted to them from the manors where they were settled. They received roughly one half of the land of their masters. A small group of so-called domestic serfs, who were personal servants of their masters and numbered some 600,000 males, did not receive any land at all.

The remainder of the farming population may be reduced to two large groups: "peasants of the crown" (*gosudarstvennye krest'iane*), computed at from 10 to 13.2 million males, and peasants of the imperial family, including about 1 million males. Peasants of these groups were settled on government land and were not in bondage to any private person. The regulation of their land tenure started in 1838 and served as a pattern for certain aspects of the Emancipation Reform of 1861. By that time, they had received practically the full acreage of government land that they held. The Emancipation Reform resulted also in the removal of various personal restrictions peculiar to their former status.

In the course of the reform, the rules applicable to transfer of and payment for land allotted to private serfs, were gradually extended to other categories of peasants. After 1887, a kind of uniform regime of tenure of allotted land was reached, as described below. However, the original size of the landholding with which a peasant family began its free farming life depended

upon the origin of the family. On the average, a family of a former crown peasant had 50–70 acres, that of a peasant of the imperial family 40–47 acres, but the families of former private serfs averaged no more than 30 acres, the general average for all peasants being about 40 acres per family.[13] Professor Robinson, an American scholar who takes a rather critical attitude towards the reform, has characterized its result as follows:

> "By West European standards the Russian peasant was not badly off insofar as the mere extent of his acres was concerned."

He compared the average Russian holding per household, which he computed at 35.5 acres, with the average holding in France which, including the large estates, was less than 9 acres.[14] In fact, other aspects of the reform constituted the principal causes of future grievances.

(b) *Redemption payments.* It was originally left to the peasants of each manorial estate and their former master to decide whether the peasants should hold allocated land in hereditary tenure for a fixed rent or should acquire the ownership and redeem the price with the

[13] Timoshenko, *op. cit.*, note 6 at 50, 51. Pavlovsky, Georgii, Agricultural Russia on the Eve of the Revolution (London 1930) 76; Rosenblum, The Agrarian Law of the R.S.F.S.R. (in Russian 3d ed. 1929) 14, 21; Vassilchikov, 2 Landownership and Farming in Russia (in Russian 2d ed. 1882) 448–9; Kaufman, Problems of Economics and Statistics of Peasant Farming (in Russian 1917) 31; *id.*, Agrarian Problem in Russia (in Russian 1919) 44–46. The average standard per male for crown peasants was computed by various scholars as 23.5 acres (Vassilchikov), 18.1 (Kaufman), and 14.3 (Timoshenko). Peasants settled on land of the imperial family received per male on the average 15.7 acres (Vassilchikov) or 13 acres (Timoshenko and Kaufman). The average per male acreage of a private serf was computed as 9.4 acres (Kaufman).

Timoshenko estimated the average per male for all kinds of peasants as 13.8 acres and Kaufman as 12.6. The average peasant family consisted of three males and the average family holdings were, at the time of emancipation, for all persons about 40 acres, for crown peasants about 50, or even as much as 70 acres, and about 30 acres for private serfs. More than half a million private serfs chose to accept one fourth of the maximal standard as an outright gift, without any redemption payments.

[14] Robinson, *op. cit.*, note 6 at 97.

assistance of the State.[15] Later, it was found more expedient to make the redemption plan obligatory, and it was so settled by governmental action in 1881. The government paid to each landowner a certain amount, which the peasants had to redeem in 49 years.

Likewise, the fixed rent established originally for the crown peasants was transformed, beginning January 1, 1887, into redemption payments for 44 years.[16]

This aspect of the reform was the most criticized by scholars and statesmen. The redemption price was considered by many too high and the rate of redemption too burdensome for the majority of peasants.[17] The redemption payments were lowered on December 28, 1881; on February 7, 1894, an installment plan for overdue payments was established; on May 13, 1896, and May 31, 1899, the terms for such payments were again deferred and, on November 3, 1905, the redemption payments were cut in half for 1906 and abolished as of January 1, 1907.[18] Thus, on the eve of the 1917 Revolution, the problem of redemption payments belonged to the past.

(c) *The village commune.* From a legal point of view, another aspect of the reform deserves closer study.

Title to allotted land was given, not to the individual peasants, but to peasant communes (*mir*), as they exist-

[15] This was stated in the Redemption Statute of 1863. However, in the former Polish provinces, redemption was compulsory. In the Russian provinces, the peasants could get, instead of a standard allotment, one quarter of it, without any redemption payment. 600,000 males used this method.

[16] The principle of compulsory redemption was extended to all the former private serfs by the Ukase of December 28, 1881 (Imperial Laws 1882, text 1), and the former peasants of the crown under the opinion of the State Council of June 12, 1886, approved by the Emperor, *id.* 1886, text 640.

[17] Timoshenko, "The Agrarian Policies of Russia and the Wars" (1943) 17 Agricultural History 195, and literature cited therein.

[18] Khauke, Peasant Law (in Russian 1913) 14.

ed on the eve of the emancipation.[19] Serfs belonging to the same manorial estate formed a commune.[20] If a village belonged to several manors, as many communes came into being as there were manors before. The commune was made collectively (jointly and severally) responsible for payment of taxes and the redemption payments. The commune was the owner, yet the main portion of the communal fields (arable land) was not used collectively but distributed among the individual peasant households. The distribution was made either in perpetuity, thus creating for each family a permanent hereditary tenure of the assigned acreage, or with reservation to the commune of the right to redistribute the land in the future. The latter system, called

19 "The owner of the land is the commune as a legal entity while the individual families have only the right of temporary tenure, from one redistribution to another, of the tract of communal land assigned to them." Ruling Senate, Second Department, Decisions 2064 and 2740 of 1889. The land allotted to a village commune was the indisputable property of the commune. Special restrictions placed upon its disposal were originally intended for the duration of the redemption period only. "Allotted" land was neither public nor governmental land nor that of the former manorial lord. The Ruling Senate consistently emphasized that "allotted" land is a grant in fee simple and the restrictions on its disposal are special rules. Ruling Senate, Plenary Assembly, Decisions of 1885, No. 125; 1895, No. 38; 1897, No. 36.

Professor Pobedonostsev is mainly known as the principal ideologist of the reactionary policies of the Emperor Alexander III. However, his studies in private law are of importance in particular for the construction of specifically Russian legal institutions. His analysis of communal tenure was recently expounded in the soviet law reviews and therefore is worth explaining. Pobedonostsev contends that in addition to individual ownership and joint ownership there also is collective community ownership, with which the village commune must be classed. In contrast to joint ownership, this is not ownership by shares. No member of the village commune has a defined share therein. The property of the commune is not public in that it is used for the benefit of individuals. In contrast to property of a corporate body, the community property is possessed and used not by agencies of such body but by individuals. Owned collectively, it is possessed and used individually and each member exercises these powers in his own right and not by mandate of the collective body. Pobedonostsev, 1 Course of Civil Law (in Russian 1896) 540 *et seq.*

20 General Statute of Peasants (1876 ed.) Section 40:
A village community is composed of peasants settled on the land of one manorial lord . . .

communal land tenure (*obshinnoe zemlepolzovanie, obshina*)[21] or redistributive commune (*peredel'naia obshina*), prevailed except in southwestern Russia (Ukraine), so that the land of 80 per cent of the peasants was subject to redistribution.[22]

Under this system, an individual household had merely temporary possession and use of the allocated field acreage, subject to change at the later redistributions. These took place either periodically or at irregular intervals. Redistributions were made by the communal meeting of the heads of the households. If a woman was the actual head of a family (e.g., a widow with children or the eldest sister), she had an equal right with the men to participate and vote.

Land was assigned to households (*dvor*) rather than to individuals, but chiefly according to the number of working hands or the total number of members in each household at the time of redistribution. The commune was at liberty to select one of these or any other principle of distribution but had to apply it equally to all households in the commune. The principle of distribution selected by the commune could not be contested, but redress was available to each peasant against unequal or unfair application to his family of the principle selected.

The emancipation statutes left the scheme of redistribution unregulated. Violations of the interests of

21 Emancipation Statute for Great Russia, Section 113 Note:

We call communal tenure such customary use of land under which the land, by decision of the *mir* (peasant commune), is redistributed and apportioned among the peasants per capita, by taxation units (*tiaglo*) or by any other method, and the taxes and dues are performed under joint and several responsibility.

This is the only definition of redistributive commune to be found in the statutes.

22 Khauke, *op. cit.*, note 18 at 33.

individual peasants by the communes and the economically undesirable frequency of redistribution induced the government to provide by the law of 1893 a minimal interval of twelve years between distributions. This law also required that distribution be made by two-thirds majority vote of all the heads of the households of the commune. The decision of the meeting making the distribution was verified by a special magistrate (*Zemsky Nachalnik*) in a semi-judicial proceeding and required the approval of a special county board consisting of the judges and higher administrative officers of the county.

The striking tendency toward an equitable levelling of landholdings within a commune might be defined as an element of collectivism or socialism in the peasant land tenure. Yet there was also an important and individualistic corollary. Houses with their adjacent lots (house-and-garden plots—*usadba*) were not redistributed as were the fields, but remained in one family.[23] Likewise, implements, livestock, crops, and other products were the absolute private property of each family. The farming itself (cultivation of the soil, sowing, harvesting, and threshing), including marketing of the products, was not a collective affair of the commune but was privately conducted by each family.

(d) *The peasant household.* However, the tenure of the allotted land, both in the redistributive communes and in those with hereditary family tenure in perpetuity, included an element of "family collectivism." It was not the individual peasant but the peasant household as

[23] Emancipation Statute for Great Russia, Section 110:
House-and-garden plot of each peasant household shall remain in the hereditary tenure of the peasant family living in the household, and shall pass to the heirs according to order of succession existing in a given locality.
Compare with Section 25 of the soviet Land Code of 1922. See Vol. II, No. 31.

a unit (*krestiansky dvor*), that was the holder of the apportioned area of "allotted" land as well as of the building and implements pertaining to the husbandry of this land. The official status of "the head of the peasant household" (*domokhoziain*), male or female, was tantamount to that of joint owner, trustee of the family estate, and its representative.[24]

Similarly to the joint holding of the apportioned field acreage by the entire family, the implements incidental to the farming on this acreage and all the accessories of the household were held in joint ownership by the household as a whole, forming a sort of family community property (*imushestvo krestyanskago dvora*). The powers of the head of the family (house-elder) to dispose of such property *inter vivos,* were limited. Neither the right to hold the allotted land nor the farming implements and accessories could be alienated freely by the head of the household. They could not be bequeathed or devised but descended according to the custom existing in a given locality.[25]

The "household" (undivided household, house community, joint family) was not identical with the family in the ordinary sense of the word. Work for the common good under the same roof was no less a criterion of membership of a household than relation by blood or marriage:

[24] In a distributive commune as well as in a commune with hereditary family tenure, the house-and-garden plot and the land allotted in the field do not constitute individual ownership of the house-elder in whose name they are recorded, but a joint ownership of the peasant household or the family as a whole. The senior member of the family, the house-elder, is merely the representative of the household before the village commune and the government. Ruling Senate, General Assembly, Decision of 1898, No. 2. Compare with Section 66 of the soviet Land Code. See Vol. II, No. 31.

[25] The peasant inheritance law is summarized *supra,* Chapter 17, note 8.

"Blood-relationship, in the proper sense of the word, is not always required, it suffices that the members be *considered* as relatives, adoption takes the place of actual descent, and the fact of sharing the daily work very often gives a stranger the rights of a relative." [26]

Vice versa, a son lost all his rights to his father's household as soon as he established his own independent home. If a daughter married and her husband joined the household of her father, both had the same rights as the other members of this household. But the husband lost his status in his father's household. Strangers who lived and worked within the household on an equal footing with the members of a family needed no formal adoption to share with them inheritance and other rights.

Several scholars have undertaken historical, legal, and sociological research as well as studies on the spot, respecting the life of peasant households in various localities.[27] In the light of these inquiries, the peasant household appears an ancient institution traceable far back and deeply rooted in the Russian peasant life.[28] Yet, the Russian peasant household was not a unique phe-

[26] Maxime Kovalevsky, Modern Customs and Ancient Law in Russia (1891) 54.

[27] Russian researches: Efimenko, Peasant Land Tenure in the Far North (in Russian); *id.*, Sketches of People's Life (in Russian); Orshanskii, "People's Court and People's Law" (in Russian 1875) *Zhurnal* of Civil and Criminal Law; *id.*, Studies in the Russian Customary and Marriage Law (in Russian 1879); Pakhman, The Customary Civil Law in Russia (in Russian 1879) 2 vols.; Kalachev, "Legal Customs of Peasants" (in Russian 1859) Archive of Historical and Practical Information on Russia; Transaction (*Trudy*) of Committee for Preparation of a Reform of *Volost* Peasants Courts (in Russian 1874) 7 vols. See also literature given by Leont'ev, *op. cit. supra*, note 8 at 337 *et seq.*

[28] Mr. Mukhin, who prepared a report on the peasant household for the drafting committee of a new Civil Code concluded:

The facts have proven that even now the family community property as an independent legal institution is not a myth nor a dying out phenomenon, but is deeply rooted in the mind of the people and deserves no less serious attention than private ownership. Mukhin, Customary Order of Succession Among Peasants (in Russian 1888). See also Leont'ev, *op. cit. supra*, note 8 at 335.

nomenon. Parallels to it may be observed in the old Germanic tribal customs, in the early laws of Ireland, and in the modern customs of India.[29] The family community among the southern Slavs, called *Zadruga* among the Serbs and *Skupstina* among the Croatians, appears the closest akin to the Russian peasant household. The Austrian Law of May 7, 1850, on the civil administration of the Croatian-Slovenian and Banat-Serbian military frontier,[30] the Civil Code of 1886 of Montenegro, compiled by Professor Bogisic, and the Serbian Civil Code of 1844, represent attempts to codify the rules of family community property among the southern Slavs.[31]

No such legislation was enacted in imperial Russia. Neither the Emancipation Statutes nor any other imperial enactment defined the status of a peasant household, although distinct references to the household as an existing institution were made.[32] So the courts in applying the written law and the local customs faced the task of giving a legal construction to the peasant household. The status of the peasant household is to be found in "case law," i.e., in the decisions of the Ruling Senate, the Supreme Court of Russia. These decisions had the binding force of precedent for other courts and administrative authorities. During the 1880's, the Senate reversed its previous decisions and firmly adopted the

[29] Kovalevsky, *op. cit. supra*, note 26 at 47 *et seq.*

[30] Grundgesetz für die croatisch-slavonische und banatisch-serbische Militärgrenze (1850) Allgemeines Reichsgesetz- und Regierungsblatt für das Kaiserthum Oesterreich, text 243, p. 987, Sections 35–50. Utisenovic, Die Hauskommunionen der Südslavien (Wien 1859).

[31] Opsti imovinski zakonnik za Crnu Goru, 1886, Sections 686 *et seq.*, Gradjanski Zakonik Kraljevine Srbije (1844).

[32] Redemption Statute, Sections 131, 170, 176; Emancipation Statute for Great Russia, Sections 110, 111, 117; Emancipation Statute for Western Provinces 81 (all 1876 editions).

standpoint that the "allotted" land and property incidental to it are not personally owned by the house-elder but are in "joint ownership of the peasant household or family as a whole." [33] The household formed "an economic and legal union of its own kind," [34] based not only upon family ties but also upon joint work for the common good. Close relatives by blood or marriage have no share in household property, if they do not contribute their personal labor or outside earnings to the household. On the other hand, strangers under the same roof, sharing the common labor, unless they are paid, have equal rights with relatives.

These and other basic elements of the peasant household were established, but the Senate refrained from giving a general legal construction, a general definition which would satisfy the requirements of systematic jurisprudence. Many theorists scorned the casuistry of Senate decisions. They thought that the household must be classed with one type or another of the legal categories established by the legal doctrine of Western Europe: joint property, legal personality, community property, et cetera.[35]

[33] Ruling Senate, Plenary Assembly, Decision of 1898, No. 2. For the previous point of view, see Decision of the Civil Division 1879, No. 39. The new point of view was stated in three decisions of the Plenary Assembly, 1882, No. 147; 1881, No. 161; 1884, No. 67. In one of the cases (*in re* Armolas) no decision was reached, so the case was brought to the State Council, whose opinion was approved by the Emperor on January 4, 1881, and acquired thereby the force of law.

[34] Ruling Senate, Plenary Assembly, Decision of 1900, No. 27. In other decisions, a tendency was noticeable to construe the household along the lines of joint property or community property (General Assembly 1892, No. 11; 1899, No. 1; Second Division 1904, No. 3041, *in re* Poluiakhov). In two earlier decisions, it was defined as a "juridical entity of a special kind" (Plenary Assembly 1892, No. 42; 1897, No. 29). Kasso, Russian Real Property Law (in Russian 1906) 189–192; Khauke, *op. cit.*, note 18 at 191 *et seq.*; Leont'ev, *op. cit. supra*, note 8 at 337 *et seq.*; Pobedonostsev, 1 *op. cit.*, note 11 (1873) at 486–488; 2 *id.* (1896) 194, 360.

[35] Shershenevich, 1 Textbook on Russian Civil Law (Russian 11th ed.

However, the peasant household as outlined by the Senate has survived the test of revolution and, to an extent, the collectivization of agriculture under the soviet regime. The provisions concerning the peasant household were formulated in the soviet Land Code of 1922,[36] along the lines established by the Senate. They may be considered a codification of the decisions of the Senate, although Section 2 of the Law Enacting the soviet Civil Code prohibits the soviet courts from using any prerevolutionary court decision. Moreover, although the Land Code of 1922 is in a large part superseded by the legislation concerning collective farming, the provisions of the Code relating to the peasant household are still applicable to households within the collective farms.[37] The membership in a collective farm is individual. So is the remuneration for the work collectively performed. Yet the house-and-garden plot is not assigned to the individual collective farmer but to a household which lives essentially under the provisions of the Land Code of 1922.

3. Legislation of the 1890's

Toward the end of the nineteenth century, laws were passed to protect the peasants from becoming landless proletarians. Individual peasants could not sell or mortgage their holdings of "allotted" land before the full redemption price was paid. Even then only peasants (former serfs or their descendants) could purchase. In addition, peasant holdings of "allotted" land, together with the farming implements and household accessories,

1914) 381–385; Meiendorf, The Peasant Household Within the System of Russian Legislation (in Russian 1909) 59 *et seq.*

[36] For their translation, see Vol. II, No. 31.

[37] See Chapter 21, p. 774 *et seq.*

were exempt from execution and attachment for debts or arrears in taxes.[38] Until 1905, the communes could not sell or hypothecate the allotted land without permit from the authorities.[39] These regulations promised security of landholding for the peasant farmer.[40]

Although the acreage held by families varied, the underlying principle was the equal right of each peasant in the commune to obtain a share. So long as the household existed, the absence of a member did not affect the share of the family. Even if a peasant stayed away from the commune without leaving a household there, on his return he had the right to receive his share in communal land.

However, the peasant commune in some degree handicapped progressive individual farming. Peasant communal farming was neither collective nor co-operative, but essentially small-scale family farming. The commune was not a unit but an aggregate of independent family husbandries. And yet, under communal land tenure, the crop acreage, the mainstay of prosperity of a peasant family, was subject to change regardless of personal effort and efficiency in farming.[41] Increase in

[38] Code of Civil Procedure of 1864 (1906 ed.) Sections 935, Note 1, 973; General Statute on Peasants, Section 6; Redemption Statute, Book II, Section 62.

[39] Sale of allotted land was restricted, and the permission of authorities was required under the Law of December 14, 1893 (Collection of Imperial Laws 1894, text 94). The same law protected allotted land from execution and prohibited the mortgaging of allotted land. The imperial Decree of November 15, 1906, which was transformed into law on July 5, 1912, authorized a special Government Bank (Peasant Bank, see note 44 *infra*) to mortgage allotted land.

[40] Arguments upholding the commune from a conservative point of view are summarized by Pobedonostsev, 1 Course of Civil Law (Russian 2d ed. 1873) 478–482.

[41] This danger was clear to Count Witte, prominent Russian statesman, who stated in 1906:

Russia presents, in a way, an exception from all the countries of the world . . . The people have been systematically brought up for two generations in the absence of the notion of ownership and legality . . . The entire

the family might automatically result in enlargement of its landholding. Moreover, each family was not completely free in the selection of methods of farming, but was bound to follow the three-field system which prevailed in the commune.[42] Again, because of the uneven quality of the soil and the aim to give to every member a share in every kind of soil, family holdings were not assigned in a compact plot but in many scattered strips.

Finally, because the commune paid the taxes and redemption payments for all its members, powers were given to the commune to collect from individual members. The commune could withdraw the use of his field acreage from a member who was in arrears; it could sell his movables non-essential for farming, appoint another member of the family as the house-elder and refuse to issue a passport to a peasant, without which he could not reside elsewhere under the passport system. The freedom of a peasant in the selection of residence and employment outside of his native village could be in this way restricted. Moreover, the commune could refuse to release a peasant in arrears, who desired to join another social class, e.g., to become a member of the merchant guild, and the consent of the commune was required when one or more members of a household wished to break it up in order to establish independent

rural populace is reared in equalizing land tenure, i.e., under circumstances which exclude any firmness and inviolability of the rights of individuals to their landholdings. Quoted from Izgoev, Peasant Community Law (in Russian 1906) 134–135.

However, originally Witte was one of the supporters of the commune. At a special conference on peasant affairs in 1903 he had shown a very indecisive attitude to the commune. See Gurko, Features and Figures of the Past (1939) 337.

[42] Under the three-field system, there are no enclosures around individual holdings. Two thirds of the land is cultivated each year, the third field lying fallow. An elementary rotation of crops is practiced by sowing in rotation one field every third year with winter rye or wheat, another with spring crops and allowing the third to lie fallow.

homes. However, all these personal restrictions were abolished in 1903, 1904, and 1906. If, prior to the acts issued in these years, these restrictions were regarded as the bondage of a peasant to the commune, such restrictions were then removed. The specific powers of the commune, the household, and the administrative authorities came to an end. Belonging to the class of peasants was no longer connected with a particular limitation of rights.[43]

All the peculiarities of the peasant land tenure described above applied to "allotted" land only. Land purchased by a peasant from a landowner was his individual and private property.

The total area owned by peasants increased constantly at the expense of the landowners through such purchases. This was especially true of the twenty years before World War I after a special governmental bank was established to subsidize and sponsor purchases by peasants.[44] While, at the time of emancipation, the area owned by peasants was practically equal to that owned by their former masters, by 1916 the peasants had extended their possessions to nearly 80 per cent of all land suitable for cultivation in European Russia.[45]

However, the expansion of the area held by peasants was inadequate to the rapid increase of rural population because of the notoriously high Russian birth rate. Nor did the level of farming technique rise sufficiently to remedy the situation. Many regions of Russia suffered from agricultural overpopulation. The peasantry as a

[43] Robinson, *op. cit.*, note 6 at 199, 211.

[44] Some 75 million acres were purchased by peasants after their emancipation. Through the governmental "Peasant Bank" established in 1881 and reformed in 1886, 1906, and 1912, peasants purchased about 27 million acres from 1905 to 1916. See Timoshenko, *op. cit.*, note 6 at 54; Oganovsky, *op. cit.*, note 6 at 105, 106; Chelintsev, *op. cit.*, note 6 at 9.

[45] See *supra*, note 6.

class augmented its landholding, but in many places per capita holdings tended to diminish below the size established at the emancipation.[46]

4. The Stolypin Reform

During the eight years preceding the commencement of World War I, communal land tenure as well as the status of "allotted" land underwent substantial modification. In 1903, the collective responsibility of the communes for taxes was abolished, and in 1905 the peasants were relieved from the payment of the balance of the redemption for "allotted" land.[47] Furthermore, after the suppression of the 1905 revolution, Prime Minister Stolypin inaugurated an entirely new era in 1906.[48] A number of laws were passed to stimulate voluntary dissolution of peasant communes and to create favorable conditions for the development in Russia of independent individual farming of the Western European type.

Under these laws, every peasant was entitled to change his communal interest, without charge, to individual ownership and to receive a title deed for the acreage which he actually held in communal land.[49] If

[46] Rural population increased from 50 million in the 1860's to 86 million in 1900, and 103 million in 1914. Rozenblum, The Agrarian Law of the R.S.F.S.R. (Russian 3d ed. 1929) 21. The average acreage per male decreased from 12.6 acres in 1861 to 9.3 acres in 1880, to 7 acres in 1900, and to 5 acres in 1916, according to computations by Kaufman, *op. cit.*, note 13 at 44–46. Professor Robinson computes the decrease per household from 13.2 to 10.4 *desiatin* (36.5 to 27.5A.) in 1905. Robinson, *op. cit.*, at 95, 291. While the precision of the computation may be disputed, it nevertheless represents the tendency correctly.

[47] Law of March 23, 1904; Manifesto of Nov. 3, 1905.

[48] He was assassinated in 1912.

[49] The imperial Decree of November 9, 1906 (Imperial Laws, text 1859), which outlined the reform, was promulgated without consent of the State Duma in the interim between the prorogation of the First and the convocation of the Second Duma, on the ground of Section 87 of the Russian Constitution. In an amended form, it was adopted later by both chambers as the Law of June 14, 1910 (*id.*, text 1043). It was supplemented by the

the household consisted of the wife and direct issue of the house-elder, the title to the plot was vested in him; otherwise, the plot was recorded in joint ownership of the members.[50] He could also consolidate his scattered holdings, that is, obtain their equivalent in one plot (*otrub,* enclosure) and remove his farmhouse there (*hutor*). As soon as a peasant received a title deed, he had the right to sell his land at will.[51] In case of enclosure, he could mortgage it, and special terms for improvement loans were offered by a governmental bank.[52] However, only peasants could buy such land, and for each region a maximum area was prescribed, limiting accumulations by single owners.[53] Communes which had not redistributed the land were prohibited from doing so in the future.[54]

About six million peasant households out of the total of twelve millions in the forty-seven most important agricultural provinces of European Russia submitted petitions for enclosures. Yet, during the brief period when the reform was in operation (1906–1914), only about 8 per cent of the total number of households actu-

Law of May 28, 1911, regulating the consolidation of landholdings (*zemleustroistvo*) (Svod Zakonov, Vol. X, Part 3, 1915 ed.).

An extremely important account of the treatment of peasant affairs in high governmental circles is given by Gurko, Features and Figures of the Past (Stanford University, California 1939). These memoirs of a high-ranking official, who actively participated in the preparation of new legislation on peasant land tenure, offer unique information on the drafting of new peasant legislation under Plehve (157–177), the internal history of the Stolypin Reform and the Ukase of November 6, 1906 (499–52), and the role of Witte (327–39).

[50] Law of June 14, 1910 (Imperial Laws, text 1043) Sections 47–48. However, certain restrictions peculiar to allotted land were not abolished for the individually owned farms. Such farms descended by custom without the right of the owner to dispose of them by will and were exempt from execution and attachment for debts.

[51] Ukase of Nov. 9, 1906 (*id.* 1906, text 1859) Art. II, Section 2(e).

[52] Ukase of Nov. 15, 1906 (*id.*, text 1876) Section 1, subsection (2).

[53] Law of June 14, 1910, Section 56.

[54] *Id.*, Section 1.

ally became established as individual farming units.[55] Thus, when the revolution broke, peasant land tenure had just begun to take on the aspect of individual land ownership.

In addition to sponsoring enclosure, a series of laws created favorable conditions for emigration to the fertile zones of Siberia. From 1906 to 1914, three and one-half million males were successfully settled there and obtained free about 40.5 acres each.[56] The three main aspects of the reform, viz., establishment of independent small-scale farms, sponsoring of purchase of land by the peasants, and emigration to Siberia, produced distinct economic benefits. The reform contributed to the prosperity of the peasants, raised their purchasing power, and created thereby a domestic market for Russian industry, which in its turn began to absorb the surplus of the agricultural population.[57]

[55] From 1906 to January 1, 1915, 5,874,015 petitions were filed (5,793,540 by peasants and 80,475 by other small farmers of peasant type) in 47 provinces having about 12 million peasant households. On the average, this represents about 50 per cent (in some provinces, e.g., Kharkov and Voronezh, the percentage was as high as 70 per cent). Among these, 2,816,483 petitioners, about 28 per cent of the total number of households or 48 per cent of the applicants, asked for establishment of individual farms. In 1,975,606 cases, the works were accomplished, and 1,048,007 individual farms were established, or 8 per cent of the total number of households possessing 8.6 per cent of the total area (about 28 million acres). In some provinces, the percentage was much higher, e.g., in Ekaterinoslav (Ukraine) it was 25 per cent. (1915) Izvestiia (News) of the *Zemskii Otdel* (Division of Peasant Affairs) of the Ministry of the Interior (in Russian) 353, 356, 357, 418.

[56] Pestrjetsky, Around the Land (in Russian, Berlin 1922) 11. Litvinov, Economic Results of the Stolypin Agrarian Legislation (in Russian 1929) 47, estimated the number of emigrants in 1896–1905 at 916,000, in 1906–14 at 2,707,000, a total of 3,523,000.

[57] Cities increased in population from 13,000,000 in 1904 to 18,250,000 in 1914, and industry made great progress. The following figures are illustrative and especially impressive, for they are taken from a soviet study of the Stolypin Reform. Annual per capita consumption of sugar increased from 13.2 pounds in 1903 to 18 pounds in 1912. The value of production and consumption of rubber goods increased from 29,000,000 rubles in 1900 to 121,000,000 rubles in 1913. The value of agricultural machinery used in entire Russia increased from 39,000,000 rubles in 1906 to 119,000,000 in 1912.

The value of other metal manufactured goods increased from 124,000,000 rubles in 1900 to 249,000,000 in 1912. The co-operative movement in Russian villages was another sign of the new spirit of activity. In 1900, there were only 783 rural co-operative banks with a capital of some 28,000,000 rubles and 300,000 members. In 1914, the number of banks reached 14,536 with a capital of 119,000,000 rubles and 9,250,000 members. Consumption co-operatives increased from 641 in 1905 to 6,100 in 1912. Litvinov, *op. cit.*, note 56 at 24, 29, 31, 38, 40; Prokopovich, Co-operative Movement in Russia (in Russian 1913) iii and *passim*.

Chapter 19

The Development of Soviet Agrarian Legislation

I. The Doctrine of Socialization of Land

In the prerevolutionary days, the Russian socialists were united in advocating the abolition of private ownership of land and the confiscation of nonpeasant estates. Yet they were divided on the system of land tenure to be introduced for the peasants after confiscation of the large estates. The Marxists considered the peasant communes a barrier to economic progress. This was true of both factions into which Marxists were divided, namely, the bolsheviks (communists), the future rulers of Russia, and the mensheviks. However, another group of Russian socialists, called "populists" in the 1860's and "socialist revolutionaries" in the twentieth century, regarded peasant communes as ready-made nuclei for socialism in Russia.

The socialist revolutionaries thought that the equalizing tendencies in redistribution of land and the giving of an equal share to every member of the peasant commune made the Russian peasants born socialists. They assumed that the peasant thought that the land belonged "to God" or to no one, and that personal labor alone justified the land title. Their program was "socialization" of land, that is, making out of it a public domain and not private or governmental property. Anyone, they insisted, is entitled to his share, so that a man work-

ing personally with the help of his own family could establish a self-sufficient, but noncapitalistic, farm, a "toil homestead." Such a holding is not property; it is a "toil tenure," which ceases as soon as the holder desists from his personal labor. It is, moreover, subject to redistribution for equalization purposes so that everyone can get as much as he is able to cultivate ("toil standard") and thereby maintain his family ("toil and consumption standard"). On the other hand, no one can hold land, who does not personally till it. The redistribution and levelling of landholding was supposed to be done on a nationwide scale.

Chernov, the leader of the socialist revolutionaries in 1917, who held for a time the post of Minister of Agriculture in the Kerensky government, stated their program as follows:

> Our demand for socialization of land means . . . the abolition of private ownership of land. . . . By socialization we will place the land in a position which will make the traditional concepts of private law inapplicable to the use of the land. We will not convert the land into the property of the communes or regions, we will not transfer it to the category of existing "government properties." We will make it nobody's. But being nobody's it shall become the *public domain*. . . . Peasant communes shall perform a public law function by distributing land in a manner by which working people will get access to it on a basis of equality of all citizens. . . . For us the peasant commune has a value inasmuch as within it lives, grows, and differentiates a general *equalizing tendency*. . . . We see the vital pulse of the peasant commune in that it leads the peasant beyond the commune to the socialization of land.[1]

The Marxians, the mensheviks as well as the bolsheviks, were distinctly opposed to "socialization" of land. However, they did not have a definite program. Four

[1] Chernov, The Land and the Law (in Russian 1917) 129–130, 197, 230.

different drafts were proposed but none of them gained the recognition of the party.[2] In a general way, Lenin and his followers among the bolsheviks, were for "nationalization" of land, that is to say, for converting the status of land into an outright governmental ownership and not into an indefinite category of public domain. The government was visualized as the distributor of landholdings. Again, it was not the small-scale peasant type of farming but rather the large-scale co-operative or governmental farming that appeared the more desirable form of utilization of land in the eyes of the bolsheviks. Difficulty in the application of such a scheme to the millions of scattered peasant households of Russia was one of the reasons for the absence of a definite bolshevik agrarian program.

Moreover, the founders of Marxism, Marx and Engels, in their day had turned away from the peasants. For them peasantry had no future and was destined "to decay and disappear in the face of modern industry"; it was a reactionary class which "tried to roll back the wheel of history."[3] But Lenin did not see in the peasantry a uniform group. He analyzed the political and social nature of peasants thus:

> Being toilers, peasants are enemies of capitalist exploitation but at the same time they are owners, . . . they follow unwittingly either the bourgeoisie or the proletariat and are capable of concluding an alliance with the ruling classes against the proletariat for the strengthening of their position as small owners.[4]

Hence, Lenin insisted on viewing the peasantry as consisting of opposed classes. The more prosperous peas-

[2] Boshko, Legal Capacity of a Peasant with Regard to Land Tenure (in Russian 1917) 103.

[3] Communist Manifesto, Essentials of Marx and Engels 41, 42.

[4] Lenin, 16 Collected Works (1st Russian ed.) 215; 14 *id.*, part 2, 2.

ants (later called kulaki) were prospective enemies of socialism in farming. At the other extreme, the "poor peasants," i.e., the farm hands and peasants with very small acreage and insufficient workstock, were expected to be won for the socialist form of farming. The in-between group of those who were neither distinctly prosperous nor distinctly poor, presented an open problem. These sociological distinctions found definite expression in soviet law. But, on the eve of their coming to power, the bolsheviks still lacked a definite constructive program with regard to land tenure.

II. Early Soviet Legislation on Land Tenure

1. Decrees Antedating the Land Code of 1922

The Provisional Government (commonly known as the Kerensky government), which came into being after the fall of the imperial regime, refrained from any decision on the agrarian problem raised by the revolution.

Local and central committees were established by the Law of April 21, 1917, to prepare the agrarian reform, the completion of which was reserved to the Constituent Assembly. Transactions affecting the transfer of real property were prohibited by the Law of June 12, 1917, pending the decision of the Constituent Assembly. Government monopoly of crops was declared on March 25, 1917, but was not enforced.[5]

However, the peasants initiated the actual seizure of large estates of their own accord. The number of such cases steadily increased and reached a total of 5,782 by October 1, 1917.[6]

[5] Collection of Laws and Enactments of the Provisional Government 1917, texts 487, 543, 1128.

[6] The following account of forcible dispossessions of landowners or plun-

Although, in the midsummer of 1917, the socialist revolutionaries held several posts in the Provisional Government, including that of the Minister of Agriculture, they abstained from an immediate execution of their program of "socialization" of land. They reserved it to the Constituent Assembly, which they expected to control. However, their left wing joined the bolsheviks in approval of immediate seizure of the large estates.

Before the Constituent Assembly convened, the November, 1917, Revolution occurred, and the soviet government came into being. Although dominated by bolsheviks, the soviet government included some socialist revolutionaries of the left wing until July, 1918.[7] Moreover, the "socialization" of land advocated by the socialist revolutionaries was inaugurated by the first soviet decrees on land. Lenin explained these tactics later as follows:

> It does not matter that our first decrees were written by the socialist revolutionaries. . . . When carrying out this decree the soul of which was in "socialization" of land the bolsheviks have stated precisely: It is not our idea, we do not agree with such a slogan, but we consider it to be our duty to carry it out, because it is the demand of the prevailing majority of peasants.[8]

On the first night of the new regime, the decree on land was promulgated.[9] It was definite only on one

der and destruction of their estates is given by a soviet scholar for 1917: in March, 49; April, 378; May, 678; June, 988; July, 957; August, 760; September, 803; October, 1,169—a total of 5,782 cases. Dubrowski, Die Bauernbewegung in der russischen Revolution 1917 (1929) 87, 90.

[7] Kolegaev, the Commissar for Agriculture, and Steinberg, the Commissar for Justice, were socialist revolutionaries of the left wing until July, 1918. R.S.F.S.R. Laws 1917–1918, text 57. For laws consistently carrying out their ideas, see R.S.F.S.R. Laws 1917–1918, text 105, 346, and Provisional Instruction in Izvestiia of the Moscow Soviet of January 30, 1918.

[8] Lenin, 15 Collected Works (1st Russian ed.) 517.

[9] R.S.F.S.R. Laws 1917–1918, text 3.

point—confiscation of large estates. This was the rationale of Section 1, which states that "landowners' ownership is abolished at once without any compensation." The large estates with all implements and buildings were to be taken over by local soviets, pending the decision of the Constituent Assembly (Section 2). It was further stated in Section 5 that "the land of peasants and cossacks from the rank and file shall not be confiscated." But an instruction (*Nakaz*) was appended to the decree for the guidance of local authorities "in carrying out the agrarian reform pending the final decision of the Constituent Assembly" (Section 4). The instruction, again referring to the Constituent Assembly, enumerated several "most just measures," among which were the following:

(1) The right of private ownership of land shall be forever abrogated; land cannot be sold, purchased, given in rent, mortgaged or otherwise alienated. All land: governmental land, land belonging to the imperial family, to monastaries, churches . . . . to private owners, to societies, and peasants shall be confiscated without compensation, converted to the "public domain" and shall be given for use to all toilers.[10]

The second Decree of February 19, 1918, was worthy of its title, "Socialization of Land." [11] Land tenure was outlined in accord with this doctrine. All ownership of land was abolished, and only the "toil tenure" of land was admitted. The main provisions of the decree are:

Sec. 1. Any ownership of the land, subsoil, waters, forests, and natural resources is abolished forever within the Russian Republic.

Sec. 2. Henceforth the land shall be turned over without

[10] *Ibid.* Concerning nationalization of land in territories incorporated after 1939, see *supra* p. 46 *et seq.*, p. 563, *infra* p. 719.

[11] R.S.F.S.R. Laws 1917–1918, text 346. The exception in Section 3 refers to the government farms (Section 20).

compensation (direct or indirect) to the use of the whole of the working population.

Sec. 3. The right to use the land shall belong only to those who cultivate it by personal labor with the exception of cases provided for by law.

Under this decree, all land in Soviet Russia was to be redistributed "on the basis of equalization according to the established standards of toil and consumption . . . the general and fundamental source of the right to use agricultural land being personal labor." [12] Hired labor in the cultivation of land was prohibited. Nor were private transactions conveying the right to use land permitted. Landholdings could not be sold, leased, donated, nor inherited. The whole of Russia was to be divided into large zones within which a thorough levelling of landholdings had to be achieved.[13] Government monopoly of trading in agricultural products, which had been declared but not enforced by the Provisional Government, was reaffirmed.[14]

Subsequent decrees deviated slightly from this "socialization" of land policy. Land was no longer declared "public domain," but direct government property ("nationalization" of land). The Decree of February 14, 1919,[15] declared:

Sec. 1. All land within the R.S.F.S.R., regardless of who is using it, is considered to be a single governmental reserve.

Sec. 2. The single governmental reserve shall be under immediate management and at the disposal of competent government departments and their local agencies.

[12] *Id.*, Sections 12, 13.

[13] *Id.*, and Section 25 and instruction appended.

[14] *Id.*, Section 19.

[15] Statute on Socialist Organization of Farming of February 14, 1919, R.S.F.S.R. Laws 1919, text 43, Sections 1, 2, 4, 7; see also *id.*, text 384, Instruction for carrying out this statute.

Until May, 1921, soviet decrees sought to place the land at the disposal of the governmental agencies for the purpose of organization of collective forms of land tenure, governmental farms (*sovkhoz*) and "agricultural communes." These forms were considered "necessary for the reorganization of agriculture on the principle of socialism . . . as well as for the union of the poorer peasants with the proletariat in its struggle against capital. . . . All kinds of individualistic land tenure will be considered transitory and to be passing away." [16] An attempt was made to give preferential treatment to the poorer peasants and to organize them in special committees for control of the villages. The poorer peasants were supposed to be the main element for the organization of "agricultural communes." [17]

However, these provisions remained on paper. The peasants interpreted the soviet decrees as authorizing the seizure and redistribution of large estates. And so it transpired that the bulk of the agricultural land in European Russia (96 per cent)[18] was actually taken over by peasants and used from 1918 to 1921 in a traditional manner as established by the imperial laws for "allotted" land, regardless of soviet decrees and their underlying theory. Individual farmers and peasants who had purchased land were dispossessed when a general redistribution of land took place. Their land was merged with the "allotted" land of the neighboring peasant communes, together with that taken from the nearby landowners' estates. The entire area obtained in this way was equally distributed among the households, includ-

[16] *Id.*, Sections 3, 61.

[17] R.S.F.S.R. Laws 1917–18, texts 524, 856; *id.* 1919, texts 43, 384, Sections 136–138. See also Law of Collective Farms (in Russian 1939) 44 *et seq.*

[18] Rosenblum, Land Law of the R.S.F.S.R. (in Russian 3d ed. 1929) 79.

ing the former independent farmers, for the most part per capita.[19] Yet no equalization on a nationwide scale took place. Peasant holdings were equalized within narrow districts, primarily within townships, and the possession of land was not settled.[20] On the contrary, the striving for equalization brought neither peace nor stable tenure. Disputes and redistribution of land between and within the villages went on and on.

No particular socialist form of tenure was introduced, in spite of the soviet government's attempts at organization of governmental farms (*sovkhozi,* State farms) or "agricultural communes," the predecessors of the collective farms (*kolkhoz,* artel). The "poorer peasants" no less than the more prosperous tried to avoid entering the "agricultural communes." Agricultural communes and State farms occupied no more than 3 per cent of the total area.[21]

Professor Goikhbarg, compiler of the soviet Civil Code, 1922, characterized the state of affairs from the communist point of view as follows:

> In spite of the abolition of private ownership of land, we got . . . small holdings allotted to individuals, their small groups, or families; in other words, we did not achieve socialization, but its antipode from every point of view—individualization, anti-socialization.[22]

Thus, the result did not comply either with the expectations of the socialist revolutionaries nor with the

[19] In 29 provinces of Central Russia covered by an official census in 1922, 88 per cent of the communes distributed the land per capita, 9 per cent per male, 2 per cent per working hands, and 1 per cent according to the distribution made in 1861. Chernyshev, Agriculture of Pre-war Russia and the Soviet Union (in Russian 1926) 52.

[20] Land Law (in Russian 1940) 44.

[21] Rosenblum, *op. cit.,* note 18 at 92.

[22] Goikhbarg, Socialism in Farming (in Russian 1919) 6; Rosenblum, *op. cit.,* note 18 at 53.

plans of the communists. Peasants took the estates of the landowners but were not prepared to give up their own possessions to the government or to accept any new form of tenure. Their resistance checked socialist experiments in this field, and they were left alone for a time so far as land tenure was concerned.

The numerous uprisings of peasants against the soviets in 1919–1921 were caused primarily by the attempts of the soviets to enforce rigidly governmental monopoly of crops. Aiming at an immediate introduction of socialism, the soviet government sought to control all industry and to be the sole distributor of all commodities, including agricultural products.[23] The principle of government monopoly of trade in grain, decreed but not enforced by the Provisional Government, was reaffirmed and developed by the soviets. All surpluses above the consumption need of the farmer were to be delivered to the government at fixed prices. The consumption standard for the farmer, set by the Provisional Government at a comparatively high level, was lowered, and prices were fixed, equivalent to confiscation. All private trade in foodstuffs was forbidden.[24] Special military detachments sent to villages for collection often abused their power.

Soviet policy of that time consisted, according to Lenin, "in actually taking away from the peasants all the surpluses and occasionally not only the surpluses, but a part of the food needed by the peasants for their own consumption." [25] These confiscations and the permanent repartition of land dissolved the benefit which

[23] R.S.F.S.R. Laws 1917–18, texts 498, 879. For characteristics of this period and its legislation, see Chapter 1, II.

[24] R.S.F.S.R. Laws 1917–18, text 346, Section 19; text 468; *id.* 1919, text 106.

[25] Lenin, 26 Collected Works (3d Russian ed.) 332.

the peasant farmer had expected to receive from the seizure of large estates.

The distribution of the estates among the peasants did not materially increase the cultivated area held by the peasants. In 29 important agricultural provinces (out of a total of 50), 53 per cent of the villages did not gain any land by the distribution.[26] Wherever there was a gain in area for cultivation, it did not exceed a fraction of an acre per capita and only in a few places did it reach half an acre, according to the soviet writers.[27]

Such increases could not raise the productivity of peasant farming to balance the disappearance of large estates which, being more efficient, were an important source of supply for the market before the revolution. Areas taken from large estates ceased to bring marketable surpluses because peasant farming, now in possession of the area, tended to be no more than self-sufficient. Peasants were not willing to produce in excess of their current needs because of the confiscations and the insecurity of land tenure caused by the permanent repartition of land. To quote the soviet textbook on land law:

> The policy of Militant Communism did not give an economic stimulus for the raising of productivity of agricultural labor of the independent farmer and therefore of farming as a whole; it caused dissatisfaction among the middle-class peasants and endangered the firmness of the union of workers and peasants.[28]

Compared with 1913, the area sown had been reduced by 1920 to nearly 60 per cent, the total yield for wheat had been reduced to one-third, for rye to one-half, for

[26] Census of 1922 taken by the Central Statistical Board. Chernyshev, *op. cit.*, note 19 at 52.

[27] Oganovsky, Outline of Economic Geography of Russia (in Russian 1922) 81.

[28] Law of Collective Farms (in Russian 1939) 56.

livestock to 60 per cent.[29] Peasants did not accumulate under such circumstances any food or even seed reserves. When in 1921 the weather conditions caused a crop failure, which occurs often in Russia, the famine was the result of the first attempt at socialism in agriculture.

2. The New Economic Policy and the Land Code (1922–1928)

The soviet government met the situation with a temporary retrocession in the enforcement of socialism. The New Economic Policy (N.E.P.) era was opened in 1921 by the Decree of March 21, which changed the confiscation of agricultural products to a tax in kind (later in money). While previously the government had determined what should be left for the consumption of the farmer and claimed the surplus, under the new tax the farmer had to give a definite quantity of his products or to pay a certain amount to the government but otherwise was free to dispose of his products in the open market.[30]

The Decree of May 22, 1922, on the "toil-tenure" of land stabilized the factual possession that had sprung up as a result of redistributions made by peasants whether in accordance with the soviet decrees or not. Factual holding was recognized as title, so that each local peasant unit, township, or village commune, had to continue to use the land which happened to be in its actual possession on the date of the decree.[31] Further

[29] Derived from the soviet statistics by Timoshenko, Agricultural Russia (1932) 160, 229, 389; Timofeev, Economic Geography of Russia (in Russian 1927) 55.

[30] R.S.F.S.R. Laws 1921, text 147; see also *id.*, texts 149 (on free trade in grain) and 212 (on barter).

[31] Land Code 1922, Section 141. May 22, 1922, was fixed as the decisive

attempts at the equalization of acreage between individual villages were barred.[32]

The principles of a new status of land tenure, outlined in this decree, were incorporated and developed in the Land Code promulgated on October 30, 1922, and put into effect on December 1 of the same year.[33] The Land Code of 1922 may be called the Magna Carta of the soviet farmer. The prerevolutionary and the new collectivist forms of land tenure were offered to the free choice of the farmer.[34] The village commune and, under certain circumstances, the individual household had the right to select any type of land tenure from among those existing before the revolution: communal tenure with periodical redistribution of land among households,[35] hereditary family tenure,[36] and individual enclosure similar to that introduced by the Stolypin reform.[37] Such enclosure might be requested by any household in a commune in the future.[38] Any selected form of land tenure was guaranteed to be granted to the tenant in perpetuity (see *infra*).

Contemporaneously with these, new collectivist forms were offered by the Land Code for the voluntary choice of the farmers.[39] One such form was the association for

date, because on that day a decree was enacted which prohibited further redistributions of land, R.S.F.S.R. Laws 1922, text 426.

[32] *Id.*, Section 142.

[33] R.S.F.S.R. Laws 1922, text 901. There was originally no single land code for the entire Soviet Union, but each constituent republic had its own code: Ukraine, of November 29, 1922; Georgia, of May 15, 1924; Byelorussia, of February 24, 1925, etc. For some of the autonomous republics, embraced in the R.S.F.S.R., special regulations were issued. In the main, the provisions of these land codes, regulating peasant tenure, are similar.

For translation of selected sections of the Land Code, see Vol. II, No. 31.

[34] *Id.*, Section 58, also Sections 10, 12, 90, 92 and 96.

[35] *Id.*, Sections 92–95.

[36] *Id.*, Sections 96–103.

[37] *Id.*, Section 99.

[38] *Id.*, Sections 134, 59, 110 and 111.

[39] *Id.*, Sections 103, 105.

joint tillage (T.O.Z.), the loosest type of collective farming under which the economic autonomy of each household was left intact and only major operations such as ploughing, threshing, et cetera, were to be done collectively. The other extreme was the agricultural commune, the purest communist form. In the agricultural commune, all properties and occasionally the living quarters were pooled. Income was to be divided by need, i.e., per capita regardless of contribution in labor and goods. The third form, which later became the official standard, was called artel, the name used for the century-old form of workingmen's co-operative. In an artel, only a part of the properties were pooled, the land and main implements and most of the livestock. Houses remained in the possession of individual households. Collectively obtained income was to be distributed primarily according to the contribution in labor and not in goods.[40] The generic term for all three was collective farming, *kollektivnoe khoziaistvo* in Russian, abbreviated as *kolkhoz*.

The Land Code of 1922 did not distinctly define the types of collective farms and their organization, leaving this matter to their charters. Model charters for communes and artels were issued by the authorities prior to and after the enactment of the Land Code.

Simultaneously with the Law of February 14, 1919 (see *supra*, note 15), the R.S.F.S.R. Commissar for Agriculture issued a model charter of an agricultural commune, which outlined its purposes as follows:

> The agricultural commune must serve as a sample of brotherly equality of all people, in their labor and in the use of the

[40] An outline of three types of collective farms was given by Stalin in his article "Dizzy with Success" (Pravda, March 2, 1930). For English translation see Stalin, Problems of Leninism (English ed. Moscow 1940) 337.

products of their labor. Therefore, one who enters a commune shall renounce for the benefit of the commune his personal ownership of money, means of production, livestock, and, in general, any property needed for the communal economy.

A new model charter was issued in 1922 that likewise required from members contribution of all property, agricultural implements, and household wares. Food and commodity staples were to be distributed equally. Likewise, the Ukrainian Model Charter of June 25, 1925, required collectivization of house-and-garden plots, living quarters, and of all consumption articles and accommodations (mess halls, laundry, et cetera). However, the Charter of 1922 introduced membership shares determined by the value of property contributed by each member. The last Charter of December 21, 1929, before the general drive for collectivization, made a further step away from pure communism. According to Section 44:

> The remuneration for the labor of the members of the commune shall be made in proportion to the quantity and quality of labor spent and work done in the communal economy by a member.

Thus, the commune tended to acquire some of the features of an artel.

The commune was originally the *kolkhoz* of the type most favored by the government. Thus, as late as 1927, the communes were assessed lower rates of agricultural tax as compared with the artel or T.O.Z. The peasants, however, preferred the other types.[41] The commune was

[41] The communes constituted 61.8 per cent of all collective farms in 1918 but fell to 13 per cent in 1922 and to 6.2 per cent in 1929 (Law of Collective Farms 1938, 76). At the same time T.O.Z., the loosest form of collective farms, showed a reverse tendency. They constituted 10 per cent of all collectives in 1919, 30 per cent in 1924, 42.9 per cent in 1927, and 60.2 per cent in 1929 (*id.* 77).

finally abandoned in 1930, when the artel was selected as the official standard.

Artel is an old Russian term. It designated a century-old form of workingmen's association very much in use among the craftsmen and seasonal workers, such as shoemakers, masons, and carpenters. An elected manager acted as a contractor under the joint and several responsibility of all the members. Share in the profits was determined by the work done by each member. Peasants organized artels for dairy products and the processing of other agricultural products.[42]

Under the soviet regime the term artel was applied to the collective farms (agricultural artel) and craftsmen's productive associations (*promyshlennaia artel, promartel*), in which the collectively obtained income was distributed among members according to the labor of each. Since 1930, when the agricultural artel became the official standard form for collective farming, it has developed into an institution of its own kind, as explained *infra*.[43]

[42] The Imperial Law (Vol. X, Part 1 of Svod Zakonov—Civil Laws, 1914 ed.) defined the artel as follows:

Section 2198 [1]. A working artel is a partnership organized for the performance of definite works or the pursuit of definite trades, as well as for the rendition of services and the performance of duties, by the personal labor of the partners on their common account, all of them being responsible jointly and severally.

Section 2198 [17] . . . The distribution of the earnings of the artel among the members shall be made by the general assembly of the artel in proportion to the contribution of personal labor by each member to the work of the artel.

[43] The first mandatory Standard Charter of an Agricultural Artel was adopted by the then existing Central Board of Collective Farms and was ratified by the Council of People's Commissars and the Central Executive Committee on March 1, 1930, thereby acquiring the force of law (U.S.S.R. Laws 1930, text 255). It was continuously amended. Some of these amendments were considered by the Convention of Best Workers of the Collective Farms, which took place in 1933. In 1935, a similar second convention was convoked to consider a new Standard Charter. The draft was revised by a committee in which Stalin participated, was passed on February 17, 1935,

The Land Code of 1922 has retained certain other socialistic features of previous land decrees. The nationalization of land was reaffirmed; private ownership of land, subsoil, waters, and forests was denied, and government ownership took its place.[44] All agricultural land formed the "State land reserve" under the management of the government department of agriculture.[45] But the governmental ownership of land was defined in terms approaching the mere right of the "lord paramount." Instead of private ownership, the private holders (individual peasants, their communes, or collectives) were granted the right "of immediate toil tenure of land" "without time limit."[46] This right, once recognized, was terminated only for reasons specified by law, namely renunciation of the right, dissolution of the household (as a result of extinction of the family, emigration, or absence for more than six years), judicial deprivation of the right for certain crimes, or expropriation of the land for public or governmental purposes.[47]

Nevertheless, the doctrine of *socialization of land,* explained above, left its trace. The right to use the land postulated personal tilling; the land was held on "toil tenure."[48] Transfers by private transactions such as

and the same day approved by the Council of People's Commissars and the Executive Committee (U.S.S.R. Laws 1935, text 82). It was also directly and indirectly amended several times. It is customarily referred to in the soviet press as the Stalin Standard Charter of the Agricultural Artel.

For translation of the Standard Charter as approved in 1935, see Vol. II, No. 30.

[44] Land Code, 1922, Sections 1, 2.

[45] *Id.,* Section 3.

[46] *Id.,* Sections 4, 11:

The right to the land which is given in toil tenure has no time limit and may be terminated only for reasons specified by law.

These reasons are stated in Section 18 explained *infra.*

[47] *Id.,* Section 18.

[48] *Id.,* Section 9:

The right to use the land for farming belongs to all citizens of the

sale, mortgage, barter, donation, or bequest, of the right to use the land were null and void and entailed for the parties loss of the land and punishment under the criminal law.[49] Yet buildings erected on the land, and other accessories, crops, and other products were the absolute personal property of the holder of the land.[50]

However, the holder of even an enclosure was not the individual peasant, as under the Stolypin reform, but the family household as a unit, as in the pre-Stolypin days. Tenure by the peasant family and not by the individual peasant was the basis upon which the legislation during the period of the New Economic Policy sought to build up agriculture. The peasant household was better defined in the Land Code than it had been by the imperial legislation. The provisions of the Code are obviously inspired by the decisions of the Ruling Senate, the Supreme Court of imperial Russia. These provisions are still recognized as being applicable to households, members of the collective farms, or independent farmers. The need for their revision has been voiced

R.S.F.S.R. (without distinction of sex, religion and race) who desire to till it with their personal labor.
The Russian term, *Trudovoe zemlepolzovanie,* is translated here as elsewhere as "toil tenure." This is the title of the chapter dealing with land tenure, and a term used throughout the Code.

[49] *Id.,* Section 27. Section 87a of the Criminal Code, as amended on March 26, 1928 (R.S.F.S.R. Laws 1928, text 269) reads:

Any violation of the law on the nationalization of land committed in the form of an open or concealed purchase, sale, agreement to sell, gift or mortgage of land, as well as exchange of landholdings without permission of authorities and, in general, any kind of transfer of the toil tenure of land contrary to the law shall be punished by imprisonment for a period of not over three years, by withdrawal of the transferred land from the person who obtained it, by forfeiture of the compensation in money or property given for it, and deprivation of the right to receive land tenure for a period of not over six years.

Sublease of land prohibited by the law is punishable in certain cases by imprisonment for a period of not over two years and deprivation of the right to receive land tenure for a period of not over six years.

[50] Land Code, Section 25.

recently by soviet writers, but no legislation has followed thus far.[51]

In general, it may be stated that the traditional forms of land tenure, such as communal and individual tenure, were outlined by the land codes following the pattern of the imperial law. In spite of their formal abrogation (see Chapter 8), many substantial provisions of these laws were carried over into the soviet land codes. In some instances the Land Code permitted the application of local customs, and, as above suggested, the soviet jurists were aware that the imperial laws were applied in the form of local customs.[52]

Taken at random, the regime introduced by the land codes meant that all peasant land tenure was put on a footing similar to the tenure of the prerevolutionary "allotted" land. But the title to the land belonged now to the government and not to the peasant commune. Also, the restrictions upon the free disposal of land, removed by the Stolypin reform, were restored, and new restrictions were added. They concerned the employment of hired labor and the leasing of land. Under the prohibition of sale and purchase of land, the lease was the only legal outlet for expansion of successful farmsteads with better working facilities, such as more efficient workers or better implements and draught animals. On the other hand, lack of implements and livestock (very common after famine) stimulated renting out the land and hiring implements or labor.[53]

[51] See *infra,* Chapter 21.

[52] Land Code, Sections 8, 55, 77. See also statement by Stuchka, 1 Course 175–176, (2d ed.) 188, quoted *supra,* Chapter 18, I, at note 3; also Polianskaia "The Role of Custom in Property Relations of a Peasant Household" (in Russian 1941) Soviet State No. 1, 40 *et seq.*

[53] 37.5 per cent of the peasants had no work stock (horses or oxen) in 1922. Collection of Statistical Information for the U.S.S.R., 1918–1923 (in Russian) 116. Timoshenko, *op. cit.,* note 29, at 73 estimates on the basis

It was the independent individualistic farming that tended to grow and expand under the New Economic Policy. Neither the governmental farms (*sovkhozi*) nor the collective farms (*kolkhozi*) gained ground at the beginning of this Policy. On the contrary, some 70 per cent of the collective farms organized during the previous period came to an end in 1921.[54] The government tried to counterbalance the growth of independent private farming by sponsoring collective co-operative farming and by checking the expansion of individual farming disguised as lease of land. It was not the lessor but the lessee who was considered to be the undesirable exploiting element, the prospective *petit bourgeois*. It was the lessor whom the soviet laws sought to protect. Lease of land by the household to which it was assigned was prohibited in 1919–1922. Afterwards, the Land Code permitted leases under certain conditions for a term of not over three years or one rotation period, provided the lessee did not employ hired labor.[55] The term was later extended to 12 years or two crop rotation periods in 1925–1927.[56] During these years, hired labor was also permitted.[57] In 1928, the term of the lease was reduced to six years,[58] and finally in 1930 hired labor was again prohibited, as well as all leasing in the regions assigned for collectivization. A prohibition upon leas-

of the soviet statistics that in the regions where grains were the principal cash crop, 27.8 per cent of the farms included rented land and 20.3 per cent rented-out land in 1927. About 25 per cent of the farms were worked with rented livestock. *Id.* at 76.

[54] Rosenblum, *op. cit.*, note 18, at 348. Law of Collective Farms (in Russian 1939) 58, though giving different figures also emphasizes the weakness of the early collectives and their tendency toward liquidation.

[55] Land Code, Sections 28–31.

[56] R.S.F.S.R. Laws 1925, texts 191, 207, 414; *id.* 1926, text 666.

[57] U.S.S.R. Laws 1925, text 183; R.S.F.S.R. Laws 1925, text 411; *id.* 1926, texts 89, 328, 666; U.S.S.R. Laws 1927, texts 605, 609.

[58] U.S.S.R. Laws 1928, text 394.

ing any agricultural land, including that in possession of government enterprises (*sovkhozi*), was issued in 1937.[59]

Step by step with these measures went the promotion of the collective farms. Peasants who would form a collective farm were authorized to get the best land in their community without the consent of the rest of the village.[60] The taxes for collective farms were reduced, loans to such farms were given, in some cases exceeding the value of their implements, and every kind of preference was allowed for obtaining agricultural machinery.[61] Although collective farms exhibited a steady growth, it appeared too slow in 1928 when the government decided to speed up socialism. From 1927 to 1928 the number of collective farms had more than doubled, and since 1921 their acreage had increased ten-fold. However, against some 500,000 households united in collective farms, there remained some twenty-four million unsocialized, and the acreage of all the collective farms was hardly equal to 1.2 per cent of the total.[62] Such moderate results did not comply with the Five-Year Plan adopted in 1928.

[59] U.S.S.R. Laws 1930, text 105; Law of June 4, 1937, *id.* 1937, text 150; Rosenblum, *op. cit.*, note 18, at 204; Land Law (in Russian 1940) 115.

[60] U.S.S.R. Laws 1927, text 161, Arts. I, IV, V, VI; *id.* 1928, text 642, Section 19.

[61] *Ibid.;* also Law on Agricultural Tax of February 20, 1929, U.S.S.R. Laws 1929, text 117, Sections 50, 51; Timoshenko, *op. cit.*, note 29 at 102; Rosenblum, *op. cit.*, note 18 at 351.

[62] Rosenblum, *op. cit.*, note 18 at 352; Law of the Collective Farms (in Russian 1939) 55, 58, 65; Timoshenko, *op. cit.*, note 29 at 103.

III. Collectivization of Agriculture After 1928

1. Drive for Collectivization

According to Stalin, it was the object of the Five-Year Plan:

> To re-equip and reorganize, not only industry as a whole, but also transportation and agriculture, on the basis of socialism.
>
> The fundamental task of the Five-Year Plan was to direct small and scattered agriculture to the road of large-scale collective farming and thereby secure an economic base for socialism in the rural districts and thus remove the possibility of the restoration of capitalism in the U.S.S.R.[63]
>
> The Party's contention was that, in order to consolidate the dictatorship of the proletariat and to build up a socialist society, it was necessary, in addition to industrializing, to pass from small individual peasant farming to large-scale collective agriculture, equipped with tractors and modern agricultural machinery, as the only firm basis for soviet power in the country.[64]

This plan implied far-reaching consequences for the entire system of land tenure established by the Land Code of 1922. The achievement of the technical task of mechanizing farming and introducing better scientific methods of mass production in agriculture required radical social changes. The government had to be the director of production and the master of produce. Scattered small peasant family farms or their loose conglomerate village communities were to be replaced by large-scale farms. These were visualized in two forms: gigantic, outright governmental "soviet farms" (*sovkhozi*)—grain and meat factories, as they were called—and collective farms (*kolkhozi*). Soviet governmental farms were organized primarily on the available non-

[63] Stalin, "The Results of the First Five-Year Plan," Problems of Leninism (English ed. 1940) 409.

[64] *Id.* 421.

utilized land and from a few former large estates not distributed among the peasants. Their organization did not materially affect the landholdings of the peasants. Although for a time certain soviet writers expected the government farms, as the highest socialist form of land tenure, to absorb the collective farms, such views were later condemned.[65]

The *sovkhozi* are governmental enterprises and there is no need to discuss them in detail in the present treatise on soviet private law. Their role in the general scheme of soviet agriculture is, comparatively speaking, modest. In 1938, they occupied only 9.1 per cent of the total area under cultivation against the 90 per cent accounted for by the collective farms, which are thus the main source of agricultural production. The *sovkhozi* could have been developed without any change in peasant land tenure as regulated by the Land Code of 1922.

The organization of the collective farms, on the contrary, required a radical change in peasant land tenure, including the abolition of the guarantees extended to peasant family farming under the Land Code. In 1929, Stalin explained the new attitude toward the peasantry as a class as follows:

> Lenin said that the peasantry is the last capitalist class. . . . This is correct. Because . . . the peasantry is a class whose economy is based on private property and commodity production on a small scale. Because the peasantry, as long as it

65 For arguments in favor of the gradual transformation of collective farms into governmental farms, see Korneev, "The Second Five-Year Plan and the Abolition of Classes" (in Russian 1932) Under the Banner of Marxism No. 1/2, 29 *passim;* Altaisky, "On the Problem of Abolition of Class Distinctions, Etc." (in Russian 1932) On the Agrarian Front No. 1, 42 *passim;* Barsukov, Let Us Create Conditions for the Abolition of Antagonism Between Village and City (in Russian 1932) 31 *passim.* Contra: Mikolenko, "On the Problem of the Forms of Property" (in Russian 1932) Soviet State No. 3, 55–64; *id.*, "Ownership of the Collective Farms" (in Russian 1938) Soviet Justice No. 17, 14.

remains a peasantry carrying on commodity production on a small scale, will breed capitalists in its ranks and cannot help breeding them constantly, continuously. . . . This means that we need *no kind* of alliance with the peasantry except *such an alliance* as is based on a struggle against the capitalist elements of the peasantry. . . . The peasantry consists of various social groups, namely the poor peasants, the middle peasants, and the kulaki. The poor peasant is the support of the working class, the middle peasant is an ally, the kulak is an enemy. Such is our attitude toward these respective social groups.[66] . . . The poor and middle class peasant masses must be mobilized against the kulaki.[67] . . . Now the expropriation of the kulaki is an integral part of the formation and development of the collective farms.[68]

In the light of these passages, the kulak appears almost like any individualistic independent farmer who, by means of the opportunities offered by the Land Code, has established himself with a certain degree of security. A numerous class, the independent peasantry did not fit the new plan and was doomed. The magnitude of the change planned and accomplished was revealed by Stalin in 1929 in the following words:

> We have passed from the policy of restricting the exploiting propensities of the kulaki to the policy of liquidating the kulaki as a class. This means that we have made and are still making one of the most decisive turns in our whole policy.[69]

The official history of the Communist Party later drew the following general picture of this turn of policy:

> Prior to 1929, the soviet government had pursued a policy of restricting the kulaki. . . . At the end of 1929 . . .

[66] Stalin, "The Right Deviation" Speech of April, 1929, *op. cit.*, note 63 at 260. 261 (italics in the original).

The restoration of kulaki must lead to the creation of a kulak power and to liquidation of the soviet power—hence, it must lead to the formation of a bourgeois government.

Id., Speech of February 19, 1933, *id.* 459.

[67] *Id.* 289.

[68] Stalin, "Problems of the Agrarian Policy in the U.S.S.R." Speech of December 27, 1929, *id.* 325.

[69] *Id.* 323.

the soviet government turned sharply to a policy of eliminating the kulaki, of destroying them as a class. It repealed the laws on the renting of land and the hiring of labor, thus, depriving kulaki both of land and hired laborers. It lifted the ban on expropriation of kulaki. It permitted the peasants to confiscate cattle, machines, and other farm property from the kulaki for the benefit of the collective farms . . . The kulaki were expropriated, just as the capitalists had been expropriated from the sphere of industry in 1918, with this difference, however, that the kulaki's means of production did not pass into the hands of the State, but into the hands of the peasants united in collective farms.

This was a profound revolution, a leap . . . equivalent in its consequences to the revolution of October, 1917. The distinguishing feature of this revolution is that it was accomplished *from above* on the initiative of the government and directly supported *from below* by millions of peasants. . . .[70]

As a result of the laws enacted and the administrative measures taken, the toil tenure of the previous period came to an end for millions of peasants, and a new form of land tenure—tenure by collective farm or agricultural artel—evolved.

2. Laws and Decrees of the Transition Period

The federal Land Code (Basic Principles of Land Tenure) of December 15, 1928, was the first enactment inaugurating the new policy.[71] For the most part, its vague and timid provisions have been outstripped in the pursuit of collectivization by subsequent decrees. It was not repealed, however, and some of its provisions are of importance. Among other things, the Code makes it clear that the federal government, and not the governments of the constituent republics (soviet states), has title to all land in Soviet Russia. The Code promises

[70] History of the Communist Party of the Soviet Union (Bolsheviks) (English ed. Moscow 1939) 304, 305.

[71] U.S.S.R. Laws 1928, text 642.

preferential treatment to collective farms and "poorer peasants," and the provisions of the Land Code of 1922 permitting enclosures are stricken from the law. It also contains a clause shaking the security of toil tenure: land may be taken away from the holder "for the purpose of fighting the kulaki." [72]

On February 1, 1930, a law was enacted assigning the chief grain-producing region to "wholesale collectivization." [73] In this area, the collective farms were declared to be not merely the preferable but the only permissible form of land tenure. The village communes were to be dissolved as soon as a certain percentage of their members had organized collective farms.[74] Forcible methods of collectivization were decreed in these regions. The law granted the provincial administration the power to confiscate all property, including personal belongings, of those families whom the local soviets considered to be kulaki and to order their immediate exile. The term kulak was never defined by law but left to the unlimited discretion of the local administration. Properties confiscated from the kulaki were to be turned over to the collective farms as a share for the poorer peasants joining them. In 1930, such properties constituted from 15 to 60 per cent, or an average of 35 per cent, of

[72] *Id.*, Sections 1, 7, 8.

[73] U.S.S.R. Laws 1930, text 105, Section 2:

2. The regional (provincial) executive committees and the governments of the autonomous republics are hereby granted the right to apply in these districts [assigned to wholesale collectivization] all measures needed to fight the kulaki, including confiscation of all properties of the kulaki and their exile from the confines of the districts and regions (provinces).

Property confiscated from kulak households after the deduction of the part necessary for payment by the kulaki of their obligations (debts) to the government, shall be turned over to indivisible funds of the collective farms as the contribution for the poor peasants and farmhands who join the collective farms.

[74] R.S.F.S.R. Laws 1930, text 621; *id.* 1931, text 465.

the capital of the collective farms.[75] The penal code was also amended to enable the courts to impose upon the kulaki punishment for acts which hitherto had not been considered criminal[76] and to punish them more severely for ordinary offenses, e.g., for failure to pay taxes on the date due.[77] It rested with the court to classify an offender with the kulaki, and the rulings of the R.S.F.S.R. Supreme Court show that it was not so much the prosperity of a peasant as his attitude towards collectivization which determined his class characteristics.[78]

A peasant of a low level of prosperity had reason to abstain from joining a collective farm. The tract of

[75] U.S.S.R. State Planning Commission, Collective Farms in 1930 (in Russian 1931) xx, xxi. Various authors have estimated the number of dispossessed kulaki at about five million. The official soviet agricultural yearbook, Agriculture in the U.S.S.R., Yearbook (in Russian 1935), gives the number of kulaki in 1928 as 5,618,000 and on January 1, 1934, as 149,000. See Volin, "Agrarian Collectivism in the Soviet Union" (1937) 45 Journal of Political Economy 612, note 5. Schlesinger, The Soviet Concept of Law (1945) 136, arrives at much higher figures.

[76] Slaughter of one's own animals under a certain age entailed a fine for a non-kulak but for a kulak it entailed confiscation of all his animals and implements, withdrawal of the land he used, and two years' imprisonment, with or without exile. U.S.S.R. Laws 1930, text 66, Section 1; *id.* 1931, text 474. See also *infra,* notes 77 and 89.

[77] For example, nonpayment of a tax on the date due, "if committed by a group of people belonging to households classed as kulaki" entailed a term of forced labor *twice* as long and a fine *five times* as high as was established for other classes of people, (R.S.F.S.R. Criminal Code, Section 60, par. 2). Refusal to pay a tax, which ordinarily entailed a fine, might have resulted, for "a peasant belonging to the upper well-to-do stratum of peasantry," in confinement for up to two years followed by exile and confiscation of all properties (*id.*, Section 61, par. 2). And, if such peasants evaded the compulsory delivery of grain to the government, the courts were instructed to qualify such act as speculation (Criminal Code, Section 107), counter-revolutionary sabotage (*id.*, Section 58[14]), or violation of the Law on Protection of Public Property (see *infra*), which crimes entailed imprisonment for up to ten years or capital punishment. See "Decision of the Commissariat for Justice of the R.S.F.S.R. of July 8, 1933," Karnitsky, Commentary to the Criminal Code (in Russian 1935) 97, Section 9.

[78] R.S.F.S.R. Supreme Court, Ruling of March 16, 1931, Protocol No. 4, quoted *supra,* Chapter 5, p. 182; see also *id.*, March 8, 1930, Protocol No. 3, Collection of Rulings of the R.S.F.S.R. Supreme Court (in Russian 2d ed. 1931) 372–373; *id.* (3d ed. 1932) 250; *id.* (4th ed. 1935) 239.

land which he had hitherto held under the Land Code in a tenure "without time limit" was to be turned in to become a part of the indivisible fund of the collective farm, not subject to return to a withdrawing member.[79] Joining a collective farm also imposed upon the peasant the duty to surrender to the farm all his livestock, in particular horses and other draught animals, his implements, seed reserves, forage, agricultural buildings, and equipment for processing agricultural products.[80] He also had to renounce his right to own any such property in the future, particularly horses.[81] None of these contributions may be withdrawn, and a member leaving the farm either voluntarily or upon expulsion is compensated in cash for only one half or even one quarter of his original contribution. The larger his contribution, the larger the proportion withheld by the farm.[82] Moreover, as a general rule, contributions in property have no bearing upon the contributor's share in the collectively obtained income of the farm.[83] Such income was and

[79] Section 111 of the Land Code of 1922 did not prohibit the return of the share in landholdings and other property contributed by him, to a member withdrawing from a collective farm. Return was prohibited by the federal Land Code of 1928, in a particular instance, viz., Section 30, Note. The Standard Charter of an Agricultural Artel of March 1, 1930, Section 3, prohibited the return of such land and assigned it to the indivisible fund of the artel (U.S.S.R. Laws 1930, text 255). See also Section 3 of the present Charter of 1935.

[80] Standard Charter 1935, Section 4.

[81] "While the peasant is in the collective farm, he may not have in his private ownership objects which may restore individual farming (a horse or a plough)." Komarov, "Objects of Ownership of the Collective Farms" (in Russian 1938) Soviet Justice No. 23/24, 30. See also Mikolenko, *op. cit. supra*, note 65 at 17; also, Standard Charter, Section 4; Law of Collective Farms (in Russian 1940) 140.

[82] Standard Charter 1935, Section 10.

[83] Standard Charter 1935, Sections 11, subsection (e), 12, subsection (f), 15. In 1930, the government permitted distribution of 5 per cent of the cash income in proportion to the contribution in property (U.S.S.R. Laws 1930, text 256). But the next year, it was reduced to 2 per cent. In 1932, such distribution was rescinded by order of the Commissar for Agriculture of July 11, 1932 (1932) Socialist Agriculture (in Russian) No. 175. Such

is still to be distributed among the members according to the contribution of each in labor.[84]

Certain restrictions on the freedom of selection of a job outside the collective farm are also implied in membership. An outside occupation, especially during the long Russian winter when the farmer remains idle, was customary and played an important role in the welfare of peasant households in many regions. The consent of the management of the collective farm is required for a member to obtain the passport authorizing him to reside in certain localities. Contracts for outside employment must be made in advance, only with specified government agencies, must be registered with the management of the collective farm, and for a time were to be made with the management.[85] For a time, too, a portion of the outside earnings of a member had to be contributed

distribution was not provided for by the Standard Charter of an Artel. See also Kazantsev, "The Legal Problems of Income Distribution in the Collective Farms" (in Russian 1938) Problems of Socialist Law No. 4, 101.

[84] Standard Charter, Section 15.

[85] Order of the Commissariat for Labor of March 30, 1931, No. 80:

The recruiting of employees from among the members of collective farms shall be effected directly by economic agencies . . . on the basis of special contracts with the management of the collective farms.

Practice under this order seems to be illustrated by the following ruling printed in Izvestiia, September 10, 1931, No. 250:

It is incorrect and against the decrees of the government to make employment contracts by which collective farms assign the members compulsory work and their wages are paid to the collective farm, which settles the account with the member in labor days.

In localities where a passport is required for residence (industrial centers), members of the collective farms may be employed only upon presentation of the consent of the management of the collective farm concerned to the outside employment of the member (U.S.S.R. Laws 1933, text 22; *id.* 1934, text 389, Section 1).

The Decree of March 17, 1933, prohibited members of collective farms from leaving the farms for outside employment without a contract with a government agency, registered with the collective farm. Members who failed to comply with these requirements were to be expelled (U.S.S.R. Laws 1933, text 116, Section 4).

Recent decrees require the contract for employment to be made with the member himself, but it must be registered with the management of his collective farm (U.S.S.R. Laws 1939, texts 221, 397, 578).

to the collective funds of the farm, from 3 to 10 per cent, or from 3 to 5 per cent in the event of seasonal work.[86] Transfer from one collective farm to another, in case of marriage, for instance, is still to an extent under the control of local authorities, whose approval of the transfer of the share of a farmer who changes his membership is required.[87]

These were, in brief, the sacrifices required of a peasant joining a collective farm. Those who had some property resisted and, when forced, tried to dispose of their seed reserves or to slaughter their cattle for their own consumption and their horses for hides. A wholesale slaughter took place: the total number of horses in the Soviet Union was reduced from 34 million head in 1929 to 19.5 million in 1932; cattle from 52.4 million head in 1930 to 40.6 million in 1932.[88] Several penal statutes made the slaughter of one's own livestock a crime.[89]

[86] Ozeretskovsky, Legislation on Collective Farms (in Russian 1931) 109.

[87] See *infra,* Chapter 20, I, 5, note 40.

[88] Number of Animals in Russia (in millions of head)

	1916	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938
Horses	35.8	34	30.2	26.2	19.6	16.6	15.7	15.9	16.6	16.7	17.5
Cattle	60.6	68.1	52.5	47.9	40.7	38.4	42.4	49.2	56.7	57	104.3
Sheep and Goats	121.2	147.2	108.8	77.7	52.1	50.2	51.9	61.1	73.7	81.3	84.6
Hogs	20.9	20.9	13.6	14.4	11.6	12.1	17.4	22.5	30.5	22.8	30.6

Relationship in Percentage of the Number in 1938

	% to 1916	% to 1933
Horses	49	105
Cattle	104	164
Sheep and Goats	85	204
Hogs	146	253

Total Loss in Round Figures 1929–1933

	(In millions)
Horses	19
Cattle	20
Sheep and Goats	65
Hogs	8

Figures for 1929–1933 from Stalin's Speech at the XVIIth Congress of the Communist Party, Stenographic Records (in Russian 1934) 20; figures for 1933–1938 from Stalin's Speech reported in Izvestiia, March 11, 1939; also Stalin, Problems of Leninism (English ed. 1940) 498, 639. In the two places, the figures for 1916 differ; those given at 639 were used.

[89] U.S.S.R. Laws 1930, text 66; *id.* 1931, text 474; *id.* 1932, text 107;

The drive for collectivization of farming continued with varying speed and intensity which cannot be traced here in detail. In any event, by 1933 the collective farms embraced 65 per cent of the peasant households and cultivated 85 per cent of the total area held by peasants, while the remaining 35 per cent of the peasants were left with only 15 per cent of the total area. In 1938, only 6.5 per cent, cultivating only 0.6 per cent of the total area, were reported remaining outside collective farms.[90] The Law of May 27, 1939, established a max-

R.S.F.S.R. Laws 1930, text 26; *id.* 1932, text 304; R.S.F.S.R. Criminal Code, as in Sections 79^1, 79^2, 79^4. Their contents are given *infra,* Chapter 20 at notes 98, 99, p. 757.

90

TABLE 1

Dynamics of Collectivization

Year	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938
Percentage of the total number of households	0.8	1.7	3.9	23.6	52.7	61.5	65.6	71.4	88.2	90.5	93.0	93.5
Percentage of the total area sown	2	2.3	4.9	33.6	67.8	77.7	83.1	87.4	94.1	98.2	99.1	99.3

Socialist Agriculture of the U.S.S.R. Statistical Returns (in Russian 1939) Table 43.

TABLE 2

Distribution of the Area Sown in 1938

	Millions of hectares (1 hectare = 2.47 ac.)	Percentage of the total
Governmental farms	12.4	9.1
Collective farms	117.2	85.6
House-and-garden plots	5.3	3.9
Employees of governmental farms	1.1	0.8
Independent farmers	0.8	0.6
Total	136.8	100.0

Area Sown in the U.S.S.R. in 1938 (in Russian 1939).

TABLE 3

Change in Distribution of the Area Sown

(In millions of hectares—1 hectare = 2.47 ac.)

	*1929	*1930	*1931	*1932	*1933	**1938
Governmental farms	1.5	2.9	8.1	9.3	10.8	12.4
Collective farms	3.4	29.7	61.0	69.1	75.0	117.2
Independent farms	91.1	69.2	35.3	21.3	15.7	0.8
Total	96	101.8	104.4	99.7	101.5	130.4

* Stalin, Problems of Leninism (English ed. 1940) 499.
** Taken from Table 2 above.

imum acreage of only 2.47 acres for an independent farm, that is to say, limited such farms to the maximum size of the individual house-and-garden plot of a collective farmer.[91] A heavy tax was also imposed upon horses owned by independent farmers, increasing progressively with the number of horses owned by one farmer.[92]

Thus, on the eve of World War II, the struggle of collective farming against the individual had been decided in the Soviet Union. The vast majority of the rural population lived and worked under the regime of collective farming.

3. Deficiencies of the Collective Farms in the Early 1930's

The collective farms did not fulfill the expectation of the government as a source of supply of agricultural products as soon as they embraced the bulk of the peasantry. The soviet government resorted to forcible procurement of grain at low prices, tantamount to requisition as practiced under Militant Communism.[93] Collective farms were either inefficient and had no surpluses or were not willing to part with them. Surpluses were stored under the pretext of forming reserves permitted by law.[94] In the words of Stalin, "The members of the

[91] U.S.S.R. Laws 1939, text 235, Section 7.

[92] Law of August 28, 1938, Vedomosti 1938, No. 11; *id.*, No. 23.

[93] The forced procurements were rather a matter of arbitrary orders of the local authorities under the broad powers granted to them than of law. See, for example, Collection of Decrees, Official Reference Book for Workers of the Procurement Apparatus (in Russian 1931) *passim*.

On the details of this period in English, see Timoshenko, "Soviet Agricultural Reorganization and the Bread-Grain Situation" (1937) 13 Wheat Studies of the Food Research Institute, No. 7, 308 *et seq.*; *Volin*, "Agrarian Collectivism in the Soviet Union" (1937) 45 Journal of Political Economy, Nos. 5 and 6, 11 *et seq.*

[94] Postyshev, "Basic Task of the Soviet Administration of Justice" (in Russian 1932) Soviet State No. 2, 11.

collective farms are collectivists in position only, while psychologically they remain private owners."[95] Members displayed complete indifference to the collective work. Failure to appear for work, poor organization of labor, red tape, lack of discipline—all these defects were emphatically pointed out by the Commissar for Agriculture in 1933.[96] Stalin complained of what he termed "mass stealing of government property" and what was in fact disposal by the collective farmers of their crops in defiance of governmental plans.[97] Work on a collective farm held insufficient incentive for the peasant. The administration also lacked technique and experience in the agricultural big business into which peasant husbandry had been transformed. As a result, field work was done carelessly, growth of weeds was abundant, sowing and harvesting were delayed, even though the timely performance of these operations is the decisive factor in good harvest in the arid Russian climate. The number of horses, cows, sheep, and hogs continued to decline.[98] In spite of the fair weather of 1931 and 1932, all this reduced the yield below that of precollectivization days. Nevertheless, procurement of grain was carried on by the government on a larger scale in 1931 and 1932 than in 1925–1928. Fully 40 per cent of the product minus seed grain was taken in 1931; in certain parts of the Ukraine as high as 80 per cent of the total crop was taken, leaving the peasants without seed grain.[99] The most fertile zones of Russia were again struck by

[95] Stalin's Speech, Pravda, January 10, 1933. See also *id.*, Problems of Leninism (English ed. Moscow 1940) 446 *et seq.*

[96] Yakovlev's Speech, Izvestiia, January 31, 1933; *id.*, January 17, 1933.

[97] Stalin, *op. cit. supra,* note 95.

[98] See *supra,* table in note 88.

[99] Timoshenko, *op. cit.,* note 93, at 311; Economic Life (in Russian) August 8, 1932.

famine in 1932–1933. The soviet laws met the situation in many ways. On the one hand, more effective control devices over the collective farms were designed and carried out, and new penal laws were enacted and enforced; on the other hand, the collective farms were reorganized to give an outlet for the personal interests of the collective farmer and yet to tie his personal welfare to the efficiency of the collective farm. The present law of collective farms is a result of all these measures.

4. Land Tenure in Areas Incorporated After 1939

Land tenure under the soviet legislation, enacted for areas incorporated during and after World War II, in a way resembles that existing in the Soviet Union on the eve of the drive for collectivization. This legislation admitted small-size family farmsteads of the peasant type. Private ownership of land was abolished; [100] large estates of any owner, including public bodies and churches, were confiscated; land was transformed into government property, and its conveyance by private transactions was forbidden. But the farmer was allowed in perpetuity hereditary tenure of small-size plots. In the Baltic republics of Latvia, Lithuania, and Estonia, the issuance of title deeds certifying this right was promised.[101] In the Western Ukraine, issuance of "excerpts from the Record Book of Registration of Peasant Toil Tenure of Land" was ordered.[102]

[100] See *supra* p. 46 *et seq.* For comprehensive survey, see Tolstoy, "Nationalization of Land in the Western Regions and Republics" (in Russian 1941) Soviet State No. 3; Kazantsev, "Land Legislation in the Latvian, Lithuanian, and Estonian Republics" (1946) *id.* No. 2, 61; Polianskaia, Land Law (in Russian 1947) 78 *et seq.*

[101] Polianskaia, *op. cit.* 80.

[102] Act of May 7, 1945 of the Ukrainian Council of People's Commissars and the Central Committee of the Ukrainian Communist Party Concerning the Restoration and Development of National Economy in the Regions of

In contradistinction to the early soviet decrees of the period of Militant Communism, no attempt was made to reach general equalization and levelling of landholdings. A maximum and minimum acreage for individual farms was instead prescribed. The surplus was withdrawn from the holders and assigned to a governmental land reserve from which allotments were made to landless farm hands and the holders of undersized farms. Farms with an area above the minimum but not exceeding the maximum size allowed were not affected; they neither gained nor lost.

The areas incorporated after 1939 belonged, prior to World War I, either to Russia or the Austro-Hungarian Empire. Among the provinces formerly Russian, the major part of Latvia, Estonia, and Lithuania was not governed by the specific laws on peasant land tenure enacted after the emancipation in 1861 (discussed in Chapter 18). The emancipation took place there earlier and was carried out without allotment of land to former serfs. There was no peasant commune whatsoever and farmers were either tenants or outright owners. Between the two World Wars, an agrarian reform increased the stratum of peasants who owned their land. In other former Russian provinces (the Ukraine, Byelorussia), the peasant communes to which the land was allotted did not usually redistribute the land. Each household held the acreage received in 1861 in hereditary tenure in perpetuity.[103] Thus, even under the imperial regime, such peasant farming was devoid of any collectivist element.

In the former Austro-Hungarian provinces, no laws

Lvov, Stanislavov, Dragobych, Tarnopol, Rovno, Volyn and Chernovitsy for 1945, Pravda of the Ukraine, May 9, 1945.

[103] See Chapter 18, II, 2(c).

comparable to the Russian legislation on peasant land tenure existed. The peasant either had no land, or very little of it, but whatever he had was his own in fee simple.

Thus, in all newly incorporated areas, individual tenure of land is strong and traditional. According to the soviet jurists, this is the reason why the soviet government has refrained thus far from any collectivization of farming on a large scale in these regions. Similarly, although other codes of the R.S.F.S.R. have been introduced in the Baltic republics, the Land Code has not.[104]

Information given on the laws concerning land in these parts is fragmentary and scanty. The soviet jurists admit that many questions still remain unanswered. Regarding the Western Ukraine, an Act of the Ukrainian soviet government of May 7, 1945, ordered the establishment of village communes as they existed in Russia before the collectivization, with the task "to organize the land tenure" in each village.[105] These communes were to be guided according to a Statute of Land Commune of 1945 by the laws of the Ukrainian Soviet Republic, special orders issued by the Ukrainian Ministry of Agriculture, and local customs if they were not in conflict with the soviet laws.[106] It remains unknown how such communes function in the former Austro-Hungarian provinces where they never before existed.

More information is available regarding the Baltic republics Latvia, Estonia, and Lithuania, which enacted practically uniform legislation. When these republics were incorporated in the Soviet Union in 1940, the maximum acreage allowed to an individual farm was fixed

104 Kazantsev, *op. cit. supra*, note 100 at 67.
105 *Lex cit. supra*, note 102.
106 This statute was printed in Pridunaiskaia Pravda, No. 94, 1945. See Polianskaia, *op. cit. supra*, note 100 at 20.

at thirty hectares and the minimum at ten hectares.[107] The landless peasants were given land according to the minimum. During the German occupation most of these allotments were cancelled, the holders were either dispossessed or declared to be tenants of the former owners. Attempts at colonization by Germans were also made.[108]

Upon liberation the maximum size of a farm was reduced by the soviet government from thirty to twenty hectares. For those peasants who collaborated with the Germans the acreage was reduced to from five to eight hectares, if not confiscated.[109] The minimum acreage given to the landless was raised to twelve or fifteen hectares. Farmers dispossessed by Germans were restored. In the redistribution of land the attitude of the claimant towards the soviet regime and German occupation was of importance.

Along with the recognition of individual farms, steps have been taken to organize collective farms but the number of such farms is rather small. Thus, in 1947, only 504 collective farms embracing 33,000 households, were reported in the Western Ukraine, which is about 3 per cent of the total of households in those regions.

[107] Latvian and Lithuanian Acts of July 22, 1940 and Estonian Act of July 23, 1940, Izvestiia, July 23 and 24, 1940.

[108] Kazantsev, *op. cit. supra,* note 100 at 63.

[109] Prior to German occupation: Estonian Act of October 2, 1940; Latvian Act of July 29, 1940; Lithuanian Act of August 5, 1940. After the liberation: Estonian Act of September 17, 1944; Latvian Acts of September 7 and October 8, 1944; Lithuanian Act of August 31, 1944. *Id.* 64; Polianskaia, *op. cit. supra,* note 100 at 82.

Chapter 20

The Collective Farm

I. The Law of Collective Farms

1. General Characteristics

The basic legislation regulating collective farms is the Standard Charter of an Agricultural Artel of 1935.[1] This is in effect a body of codified laws and regulations, which, enacted during the period of transition, gradually created the present features of the artel. Moreover, numerous enactments issued after 1935 have indirectly amended the Standard Charter. The collective farm at the present time is the product of struggle and unsettled compromise. It cannot be wholly identified with the original plans of the soviet government and with the collective farms of the previous period. Nor can the longings of the individualistically minded peasantry win such a victory at the present time as they did under the New Economic Policy. However, in a collective farm, government control and collectivism are combined with outlets for private initiative, individual ambition, and even private possession. Stalin emphasized that "in the blending of the personal interests of the collective farmer with the public interests of the collective farm is the key to making the collective farms strong."[2] The slogan

[1] U.S.S.R. Laws 1935, text 82 (hereafter cited as "Standard Charter 1935"). Its history is given *supra*, Chapter 19, note 43. For a full translation, see Vol. II, No. 30.

[2] Stalin's Speech to the Committee of the Second Convention of the Best Workers of the Collective Farms in 1935, quoted from Stalin's Charter of an Agricultural Artel (in Russian 1935) 3.

is: "The collective farms must be communist and the peasants prosperous." [3]

Thus, together with tight governmental control, organization of collective work and compensation for labor contributed by individual members of the collective farm are designed to encourage personal efficiency and penalize inefficiency. Collectively obtained income is distributed on the basis of piecework and of the number of so-called labor days (see *infra*) credited to each member. Moreover, miniature private farming is allowed to each household in a collective farm. Although all the fields are cultivated collectively, a house-and-garden plot of from 0.62 to a maximum of 2.47 acres, depending upon the region, is allocated to each household for private farming. A limited number of animals, also depending upon the region, and an unlimited number of poultry may be raised and privately owned by each family. However, this private farming must be secondary to the collective farming. The blend and equilibrium of collectivist and private elements in the collective farms is not static but dynamic. It is a product of compromise, of trial and error, and bears the traces of the struggle from which it has evolved. Moreover, the provisions of the Standard Charter are rather the ideal scheme of organization of a collective farm than a true picture of its actual functioning. It displays the aims rather than the achievement of collectivization. In restrospect, the preambles to soviet laws indicate continuous departures on a large scale from the principles announced. Certain of these principles are indirectly changed by numerous decrees; others are simply neglected in practice. The soviet textbook on the law of collective farms of 1939

[3] Standard Charter 1935, Section 1, paragraph 2 in fine.

attributes violations of the Charter in part to the subversive activities of rightist-leftist opposition but also recognizes a general failure of the declared scheme to work smoothly. It reads:

> The results of subversive activities are in the process of liquidation, and yet, until their complete liquidation is achieved, we cannot say that the Standard Charter of an Agricultural Artel has been completely carried out. Aside from subversive distortions, one often meets with violations of the Charter, the absence of a proper bolshevik fight for its realization, and a lack of understanding of its significance on the part of those who work to establish collective farms, the land agencies, the local soviets, and the judicial bodies.[4]

A more categorical recognition of the fact that the provisions of the Charter are not observed was stated in the preamble of an Act of September 19, 1946, which gives a comprehensive survey. It reads in part:

> . . . The U.S.S.R. Council of Ministers and the Central Committee of the All-Union Communist Party (Bolsheviks) have established the fact that the Charter of an Agricultural Artel is seriously violated by the collective farms.
>
> These violations consist of improper credit of "labor days," dissipation of the collectively held fields of the collective farms, spoliation of the property of the collective farms, abuses of power by the district and other party and soviet officials, violation of the democratic basis of management of the affairs of the collective farms, such as the principle that the managers and the chairmen of the collective farms must be elected and must present the accounts to the general meetings of the collective farmers.[5]

In view of the foregoing, an attempt will be made here to present the dynamics of the regulation of collective farming.

[4] Law of Collective Farms (in Russian 1939) 108.
[5] U.S.S.R. Laws 1946, text 254. For a translation see Vol. II, No. 35.

2. Land Tenure of a Collective Farm

After the general reshuffling of landholdings in the stormy days of the drive for collectivization, a certain stabilization was inaugurated. To counterbalance the collective farmers' loss of their individual tenure of land, security was extended to the tenure of land held by them collectively. The laws tended to bring about physical stabilization of the land used by the collective farms and to provide a legal status for such land tenure. Thus, the Law of September 3, 1932, though "keeping intact" government ownership of all land, promised each collective farm the security of the land it used "within the present boundaries."[6] The Standard Charter of an Agricultural Artel of 1935 restated the guarantee more definitely:

> Land occupied by the artel (like any other land in the U.S.S.R.) is governmental property of all the people. Under the laws of the workers' and peasants' State, the use of the land shall be secured to the artel for an indefinite period, that is to say, forever, and may neither be sold nor bought nor let by the artel.
>
> The executive committees of the district soviets shall issue to each collective farm a government title deed securing the use of the land for an indefinite period and fixing the size and exact boundaries of the land used by the artel; . . .[7]

The law of 1935 which defined the procedure of issuance of title deeds also provided for the necessary surveying and shifting of holdings needed for better enclosures, as well as for the keeping by district land offices of special records of title deeds comparable to land title

[6] U.S.S.R. Laws 1932, text 388.
The Acts of April 14 and May 13, 1943, allowed the assignment to collective farms for a limited period of time (not less than ten years) of grazing land from government lands for promotion of animal husbandry. Polianskaia, Land Law (1947) 56.

[7] *Id.*, 1935, text 82, Section 2.

records. Each title deed is impressive in appearance, bearing the soviet coat of arms and the seal of the district land office.[8] It may be noted in passing, however, that the soviet jurists in 1939 and 1940 considered the issuance of deeds still far from satisfactory.[9] In 1939 it was restated that "the common land of collective farms shall be inviolable and under no circumstances may be decreased without a special permit by the U.S.S.R. government; it may only increase."[10]

The local authorities were prohibited from interfering arbitrarily with the landholdings and properties of the collective farms.[11] Any anticipation of a future trans-

[8] *Id.* 1935, text 300; *id.* 1940, text 90. With respect to the collective farms of fishermen, see *id.* 1939, text 90.

[9] Thus, Pavlov, "Stalin's Charter of an Agricultural Artel Is the Firm Law of the Development of Collective Farms" (in Russian 1938) Problems of Socialist Law No. 5, 71, complained that the issuance of deeds has not yet been accomplished and that many of them are totally defective and contain erroneous measures. The Land Law Textbook (in Russian 1940) 228, states that extensive surveying is being done to correct errors made when the deeds were issued. The Law of Collective Farms (in Russian 1939) 108, states:

The project of issuance of deeds has not yet been accomplished. Many deeds issued need considerable corrections because of their defects.

[10] U.S.S.R. Laws 1939, text 235, Section 2.

The Act of April 7, 1942, allowed local soviets to assign to various soviet organizations land of collective farms not used by them, provided the farm concerned agreed to it. Polianskaia, *op. cit. supra*, note 6 at 62. Such assignments were withdrawn under the Act of September 19, 1946, see Vol. II, No. 35.

[11] R.S.F.S.R. Laws 1932, text 373:

1. Local administrative authorities as well as other government agencies and public organizations (including co-operatives) are hereby prohibited to make dispositions in regard to property of the collective farms, to take away such property, to dispose of cash, livestock, and produce of the collective farms, to order these farms to form reserves in money or in kind for other purposes than those provided for in their charters and in the special decrees of the government.

2. Property belonging to the collective farms may be transferred for the use of other institutions and organizations only under a contract made by the management of the collective farm and the institution or organization concerned.

A soviet jurist comments, however, that "the prohibition of arbitrary disposal by governmental and public organizations of the property of collective farms does not mean that the government renounces direction of the collective farms and of their economic activities in particular." Mikolenko,

formation of collective farms into government farms was severely condemned.[12] Taking land from the collective farms by right of eminent domain is permitted only on the basis of compensation in money and in land.[13] Moreover, the Law of August 7, 1932, gave the property of collective farms the status of the best protected form of property in the Soviet Union—government property. The property of collective farms and co-operatives together with the government property constitutes a new and specially protected category of "socialist property," which is declared "sacred and inviolable." This law reads in part:

> Article II.
>
> 1. Property of collective farms and co-operatives (crops in fields, collective stocks of products, cattle, co-operative warehouses and depots, and the like) shall be placed on an equal footing with government property, and its protection from dissipation shall be reinforced by all possible means.
>
> 2. The supreme measure of social defense, death by shooting, together with confiscation of all property, shall apply as a measure of judicial retaliation for pillage (theft) of the property of collective farms and co-operatives; if there are extenuating circumstances, confinement for not less than ten years and confiscation of all property may be substituted.
>
> 3. No amnesty shall apply to offenders convicted for pillage of the property of collective farms or co-operatives.[14]

As the official textbook on criminal law of 1943 comments:

> It would be a mistake to think that the Law of August 7, 1932, shall apply only in cases of theft of socialist property. The pillage mentioned therein may be committed in any manner: by larceny, embezzlement by officials, misappropriation,

"Ownership of Collective Farms" (in Russian 1938) Soviet Justice No. 17, 17.

[12] See *supra*, Chapter 19, note 65.

[13] U.S.S.R. Laws 1938, text 177.

[14] U.S.S.R. Laws 1932, text 360, Art. II, Sections 1–3. See also Chapter 16, I, 3.

fraud, or by any kind of unlawful taking possession of such property.[15]

The textbook also stresses that several separate statutes enacted in 1933 and 1934 have brought under this law a variety of activities, such as "any act defrauding (deceiving) the government in accounting for the production of collective farms . . . sabotage of agricultural works; larceny of seeds; subversive reducing of standards of sowing, resulting in the pollution of fields and in low yield; wanton breaking of tractors and machinery and destruction of horses." [16] The R.S.F.S.R. Supreme Court also recommended that this law apply in cases where accounting officers and members of the boards of directors of collective farms or co-operatives have maliciously failed to take the necessary preventive measures against embezzlement;[17] and the U.S.S.R. Supreme Court reiterated in 1940 that the law applies to "unauthorized harvesting for private needs on land belonging to collective or governmental farms." [18] The R.S.F.S.R. Supreme Court also held that failure to denounce any crime coming under the Law of August 7, 1932, entails prosecution for misprision.[19]

Under such liberal interpretation, this law has become a universal penal law against offenses affecting the func-

[15] Criminal Law, Special Part, Goliakov, editor (in Russian 3d ed. 1943) 89.

[16] U.S.S.R. Laws 1933, text 41; also failure of the tractor driver to follow regulations which results in damage to machinery, *id.*, text 361; malicious spending, dissipation, or concealing of milk collected for the government, *id.* 1934, text 439, or of cotton, R.S.F.S.R. Laws 1934, text 256.

[17] R.S.F.S.R. Supreme Court, Plenary Session, May 28, 1933, Protocol No. 29, Criminal Code (in Russian 1943) 105.

[18] U.S.S.R. Supreme Court, Plenary Session, April 3, 1940, *id.*, 169. The U.S.S.R. Council of People's Commissars reiterated the necessity of applying this law in cases of "dissipation of agricultural products." Izvestiia, July 18, 1943.

[19] R.S.F.S.R. Supreme Court, Ruling of June 27, 1933, *op. cit. supra,* note 15 at 92.

tioning according to plan of collective farms, whether committed by strangers or by members of collective farms. Yakovlev, at one time Commissar for Agriculture, considered it "the most important law for strengthening collective farms," [20] and Stalin called it in 1933 "the foundation of revolutionary legality." [21] Thus, the privileged status of socialist property granted to the collective farms proved to be a double-edged weapon of protection directed equally against nonmembers and members themselves, that is, against their carelessness in handling the collective affairs of the farm and its collective property.

The Law of August 7, 1932, was modified on May 26, 1947, to the extent that confinement for 25 years in a camp of correctional labor was substituted for the death penalty.[22] But the Edict of June 4, 1947, Concerning the Increased Protection of Government and Public Property, provides for lengthy terms of such confinement (5 to 20 years) for "larceny, misappropriation and embezzlement and other kinds of theft" of property of

[20] Izvestiia, January 31, 1933.

[21] Stalin, Speeches and Articles between the XVIth and XVIIth Conventions of the Communist Party (in Russian 1934) 205–206; *id.*, Problems of Leninism (English ed. 1940) 436.

Persons convicted under this law constituted, in 1932, 20 per cent of all those convicted by courts in the Soviet Union. (1936) Socialist Legality No. 8, 5; see also Estrin, 1 Course of the Soviet Criminal Law (in Russian 1935) 140. Later, the law was applied less frequently. The number of persons convicted under this law in 1937 constituted only 1.3 per cent of the number convicted in 1933 and 9.2 per cent of the number convicted in 1935. Mankovsky, Problems of Criminal Law in the Period of Transition (in Russian 1939) Soviet State No. 3, 88. The commentary to the Criminal Code by A. Trainin (1941) and the textbook on criminal law of 1943 refer to several court decisions indicating that the trend is not to apply the Law of August 7, 1932, where damage is small, but, on the other hand, to apply it wherever the offense was organized, repeated, or committed by a person previously convicted. Criminal Law Textbook, Special Part (in Russian 1943) 92; Trainin and others, The R.S.F.S.R. Criminal Code (in Russian 1941) 248.

[22] Edict of May 26, 1947, Vedomosti 1947, No. 17.

collective farms and co-operatives.[23] Consequently, although the death penalty is at present excluded, there are now even broader possibilities of applying severe penalties for any mishandling of the property of the collective farms.

In spite of the above laws intended to secure the landholdings and the property of the collective farms, numerous violations were recently disclosed. The survey completed by January 1, 1947, of 222,000 collective farms, established 2,255,000 cases of illegal possession of collective land in 198,000 farms. Altogether, 4,700,000 hectares (12,000,000 acres) were restored to the collective farms, 4,000,000 hectares (10,000,000 acres) having been taken from various soviet offices and organizations, and an additional 521,000 hectares (1,250,000 acres) withdrawn from the individual members of the collective farms and 177,000 hectares (430,000 acres) from outsiders. In addition, 140,000 head of cattle and 15,000,000 rubles in cash, illegally held, were ordered returned to the collective farms.[24]

3. Limitations on Disposal and Exploitation of Land

The security of land tenure granted to the collective farms also implies limitation upon both disposal and exploitation of the land. Such land may not be sold, mortgaged, bartered, or sublet by the collective farm. It must be used for farming only, and a collectively held field must be tilled by the collective labor of the members.[25] This general principle proved difficult to enforce.

[23] Edict of June 4, 1947, *id.*, No. 19, discussed in Chapter 16, I, 6.

[24] Andreev, "Report to the Central Committee of the Communist Party" (in Russian) Pravda, March 7, 1947, at 3.

[25] Standard Charter 1935, Sections 2, 13.

Hired labor had to be permitted for employment of persons with special qualifications and special training, such as engineers, agriculturists, et cetera. Moreover:

> The hiring of outside casual labor shall be permitted only under exceptional circumstances, when urgent operations cannot be performed in time by the members working at full speed, and also for building and construction operations (Standard Charter 1935, Section 13).

In spite of the contrary provisions of the Standard Charter of an Artel, the collective farms in fact used to let members and nonmembers perform certain operations privately.[26] The prohibition of such practice under penalty was stressed by the Law of May 27, 1939, as follows:

> Chairmen of collective farms who allow hay in collectively held fields, meadows, and forests to be mowed privately by individual members of the collective farm, or persons who are not members, shall be expelled from the collective farms and prosecuted in court for violation of the law.[27]

Further limitation on the use of land permanently allotted to the collective farms was made in 1939, when it was disclosed that some of them had begun exploitation of the subsoil (as by mining coal), and others had undertaken the processing of their products for market. The government made clear that collective farms may use the surface assigned to them for farming only, and that any expansion of their economy along industrial lines is barred. The law prohibits the collective farms from owning "industrial establishments employing hired labor and such industrial establishments, not connected

[26] Land Law Textbook (in Russian 1940) 129; Kolesnikov's articles (in Russian 1934) Socialist Agriculture, September 14 and 16, 1935. Nos. 212, 214; Pravda, September 21, 1934.

[27] U.S.S.R. Laws 1939, text 235, Section 6. The U.S.S.R. Supreme Court instructed the courts in April, 1940, as to the provisions of the Criminal Code under which such acts must be indicted. (1940) Soviet Justice No. 8.

with farming, as manufacture products for sale outside the collective farms." [28]

It may also be mentioned that, although security of tenure within the boundaries fixed by their title deeds was promised, several acts were promulgated in 1940 ordering redistribution of land in the Central Asiatic republics and the Ukraine. The law authorized the governments of the Central Asiatic republics to take land away from the collective farms "which do not use it and will not be able to use it in the coming years" and to give it to those with small landholdings. The purpose of redistribution was also to stimulate the growing of cotton "by cultivation of newly irrigated land" and "to transform nomadic animal husbandry into settled farming." [29] More limited was the redistribution in the Ukraine, where the law permitted correction of deeds and the boundaries stated therein to facilitate the introduction of a more advanced system of crop rotation ordered at that time. However, a change of boundary anywhere requires the approval of the federal Council of Ministers.[30] By and large, outside the cotton-growing regions of Central Asia, the security of land tenure of collective farms was not materially affected by these laws.

In 1938–1939, the average acreage of a collective farm was 1,500 hectares (3,705 acres), with the average area sown 400 hectares (988 acres), uniting on the average 75 peasant households. The collectively held acreage

[28] Pravda, October 22, 1938; Izvestiia, October 23, 1938; U.S.S.R. Laws 1939, text 203, Section 1.

[29] Concerning the Uzbek republics, see U.S.S.R. Laws 1940, text 2; Tadjik, *id.*, text 120, Art. I, Section 1; Turcoman, *id.*, text 253, Art. III, Section 5; Kazak, *id.*, text 270, Art. II, Section 6.

[30] U.S.S.R. Laws 1940, text 148, Sections 1 and 2, not to be confused with text 149, which bears the same title and date, March 5, 1940.

corresponding to a household varies greatly with the region. The average for the entire Soviet Union is nearly 50 acres, but it is less than that in European Russia, e.g., 22 acres in the Ukraine, 20 acres in the Moscow region, 25 acres in Kursk, and 34 acres in Kalinin.[31] It shows a decrease rather than an increase in acreage per family as compared with the time of emancipation from serfdom in 1861, when the acreage per family in European Russia was about 40 acres.[32]

Two categories of landholdings of a collective farm come under special rules: house-and-garden plots, which are discussed *infra,* Chapter 21, and forests.

4. Forests

As a general rule, forests of commercial, cultural, or protective significance have been retained under the direct administration of government agencies.[33] The collective farms received small tracts of forest of purely local and noncommercial significance to be used for current needs, such as firewood, pasture, et cetera. Some of these tracts are subject to special restriction and cannot be converted into fields, the so-called "water conservation forest area." [34]

[31] Land Law Textbook (1940) 119. Pravda and Izvestiia, March 22, 1940.
[32] See Chapter 18, p. 669.
[33] The State was the largest owner of forest land in Russia before the revolution. Under the soviet regime, privately owned forest land of any importance was also taken over by government agencies. Until the 1930's, the individual republics passed legislation regulating forestry; since then, the federal government has gradually taken over the matter. See the R.S.F.S.R. Forestry Code, R.S.F.S.R. Laws 1923, text 564; *id.* 1929, text 941; *id.* 1932, text 126; *id.* 1934, texts 129, 130; *id.* 1936, text 144; U.S.S.R. Laws 1929, text 550; *id.* 1930, text 465; *id.* 1931, texts 57, 313; *id.* 1932, texts 3, 4; *id.* 1933, text 14; *id.* 1934, texts 4, 239; *id.* 1936, text 311; *id.* 1937, text 373; *id.* 1940, text 4; *id.* 1945, text 58; Economic and Financial Legislation 1937, No. 33, 3; the use of pastures and meadows is now regulated by the Rules of August 17, 1947, U.S.S.R. Laws 1947, text 116; Land Law Textbook (in Russian 1940) 202 *et seq.*
[34] U.S.S.R. Laws 1936, text 311; *id.* 1937, texts 138, 175; *id.* 1938, text

5. Assets of a Collective Farm

The soviet laws and jurists indicate the following sources of the assets of a collective farm:

(a) The initiation fee of members, 20 to 40 rubles per household (equivalent to a few dollars), which may be deducted from the later earnings of the new member;

(b) Property contributed by the members to the common fund of the farm (socialized property);

(c) Property donated by the authorities, including property confiscated from the kulaki;

(d) Produce;

(e) Property obtained from transactions with third parties, including cash.[35]

The entire capital of the collective farm is divided into two unequal parts, "indivisible capital" and "share capital." The indivisible capital may not be subdivided into shares and may not under any circumstances be distributed among the members or diminished. Only from one quarter to one half of the contribution of a member in property is assigned to the "share capital" as his share. The balance goes to the indivisible capital.[36] No dividend is distributed by shares. The income of the farm is distributed according to the labor contributed by each member.[37] The greater the value of the property contributed by a member, the smaller the portion of it credited to the share capital. In the event that a

203; Land Law Textbook (in Russian 1940) 28 *et seq.;* Byelorussian Laws 1937, text 104; *id.* 1938, text 146.

[35] R.S.F.S.R. Laws 1932, text 373, Section 3; Mikolenko, "Ownership of Collective Farms" (in Russian 1938) Soviet Justice No. 17, 17; Law of Collective Farms (in Russian 1940) 139.

[36] Standard Charter 1935, Section 10.

[37] *Id.*, Sections 1, 15; Law of Collective Farms (in Russian 1939) 294; *id.* (1940) 256.

member leaves the farm voluntarily or upon expulsion, he may not claim the properties which he contributed, and he is compensated in cash only for the value of his share in the share capital.[38] Initiation fees, property given to the collective farm by the authorities, and any increase in working capital, such as new buildings, implements, cash reserves, or acquired livestock and savings, are credited to the indivisible capital, together with the above-mentioned portion (from one quarter to one half of the members' contributions and a certain portion of the annual income).[39] Thus, the growth of material resources of a collective farm does not affect the share capital. The collectivist element in collective farming is thereby given predominance over the individualist element.

If a member wishes to be transferred to another collective farm and to take with him his share in the share capital (e.g., in case of marriage with a member of another farm and the desire of the newlyweds to establish their household on one or another farm), not only must the consent of the farms be obtained but also permission for such transfer from the local administrative agencies, viz., the director of the machine-tractor station (see *infra*) and the head of the district land office.[40]

[38] *Id.*, Section 10, paragraph 2.

[39] *Id.*, Section 11, subsection (f); Law of Collective Farms (in Russian 1939) 187, 199; Kazantsev, "Legal Problems of Distribution of Income in the Collective Farms" (in Russian 1938) Soviet Justice No. 15, 5 *et seq.*; Mikolenko, "Ownership of Collective Farms" (in Russian 1938) Soviet Justice No. 17, 74 *et seq.* The Charter originally (in 1930) required from 10 to 30 per cent of the income to be assigned to the indivisible capital. In 1935, the requirement was reduced to from 10 to 20 per cent. Since April 19, 1938, it has not been more than 10 per cent.

[40] Order of the People's Commissar for Agriculture of May 28, 1934, approved by the Council of People's Commissars, June 26, 1934, (1934) Collection of Basic Resolutions and Orders of the U.S.S.R. People's Commissariat for Agriculture No. 14. Kazantsev, "Legal Problems of Membership in the Collective Farms" (in Russian 1938) Soviet Justice No. 20/21, 43.

A collective farm is protected from foreclosure. It cannot be dispossessed for nonpayment of private debts or for arrears in taxes. Certain of its properties are exempt from attachment and levy of execution.[41]

6. Distribution of Income and Deliveries to the Government in Kind

The distribution of the income in money and in produce earned by the collective farm is regulated by the Charter, with the idea of securing first the satisfaction of government needs. "Distribution of the income of a collective farm," says a soviet jurist, "cannot be reduced to division of the income among the members."[42] It is the exact requirement of law, especially emphasized by the soviet writers, that in the first place the collective farm must "fulfill its duties toward the State," i.e., de-

considers that in case of transfer, the member's share should not be paid in cash.

[41] The provisions of various laws dealing with this subject were summarized by the authors of the textbook of the law of collective farms of 1939 in the following list of property of a collective farm exempted from attachment and levy of execution:

(1) Establishments of home industry, insofar as they are permitted to a collective farm;

(2) Basic buildings belonging to the indivisible capital, seed reserves, and insurance reserves;

(3) Raw material and fuel needed for three months' operation of the establishments of the collective farm;

(4) Living quarters and farm buildings;

(5) Implements and animals required for execution of the assigned production plan;

(6) Crops not yet harvested;

(7) A certain portion of produce according to a per capita schedule established by law;

(8) Seeds necessary for sowing in the current year at minimum standards;

(9) Forage in a certain per capita quantity established by law;

(10) Insurance compensation received by the collective farm under mandatory insurance;

(11) 30 per cent of the deposit account. U.S.S.R. Laws 1932, text 410 [b]; R.S.F.S.R. Laws 1933, text 53; *id.* 1934, text 242; U.S.S.R. Laws 1935, text 125; *id.* 1937, text 120; Law of Collective Farms (in Russian 1939) 188, 189; Mikolenko and Nikitin, Law of Collective Farms (in Russian 1946) 103, 104.

[42] Kazantsev, *op. cit.*, note 39 at 5.

liver the amount of produce assigned to the farm by the governmental plan, pay taxes and obligatory insurance premiums, return seeds lent by the government, and pay in produce for the services of the government machine-tractor station (see *infra*). The Charter also regulates in detail all kinds of security reserves which must be put aside before the balance is distributed among the members.[43] Thus, each collective farm must form seed reserves necessary for the execution of the government sowing plan and established sowing standards, and forage reserves sufficient for the execution of the governmental plan for the development of animal husbandry. The farm may also establish a social security fund of up to 2 per cent of production for aid in sickness, old age, et cetera, and emergency reserves of up to 10 per cent of the amount distributed among the members by labor days, to be used in case of crop failure.[44] In April, 1938, the soviet government sought to secure for distribution among the members from 60 to 70 per cent of the cash income, but this rule enacted in April, 1938, was abrogated in December of the same year.[45]

The first duty of the collective farm to the State is to deliver in kind the amount of agricultural produce levied from the farm under the government procurement plan. The present system of such deliveries, tantamount to a tax in kind, originated in 1932, when the unlimited requisitions of the first years of collectivization were replaced by definite levies.[46]

[43] Standard Charter 1935, Sections 1, 11.
[44] *Id.*, Section 11; also Kazantsev, *op. cit.*, note 39 at 4.
[45] U.S.S.R. Laws 1938, texts 116 and 308.
[46] U.S.S.R. Laws 1932, text 418; *id.* 1936, text 452 and *id.* 1937, texts 62, 66, re meat; *id.* 1932, text 500 and *id.* 1938, text 3, re dairy products; *id.* 1933, text 25 and *id.* 1938, text 5, re grain. A most comprehensive survey

7. Trade in Agricultural Produce: Taxes

In comparison with the government monopoly of agricultural produce under Militant Communism and the free trade in produce under the New Economic Policy, this system displays its own distinct characteristics. Government procurement and supply are combined with a free market. Each farm, collective or individual, must deliver a specified quantity of products to the government and is at liberty to dispose of the surpluses. A collective farm may distribute its surpluses among the members or may sell the produce and distribute the proceeds. However, the middleman is eliminated. Products may be sold only by the producer to the consumer. Buying for the purpose of reselling is a crime.[47] From 1933 to 1936, the government every year prohibited private trade in agricultural products at harvest time and opened individual regions to private trade as soon as they had filled the assigned quota.[48] Since 1937, no such prohibition has been issued, and every farm is permitted to sell its surpluses as soon as it has filled its quota. By increasing its production, the farm increases the quantity of its produce freely marketable at higher prices. Until 1939–1940, the quantity of grain to be delivered by each farm was determined according to the crop area, and the quantity of meat, dairy products, et cetera, by the number of head of livestock owned by a farm. This method proved to offer little incentive to animal breeding. The more cattle a farm had, the larger its levy of meat, butter, milk, et cetera. Thus, to stimu-

of the soviet policy regarding deliveries of agricultural products in 1931–1936 is to be found in Timoshenko, "Soviet Agricultural Reorganization and the Bread Grain Situation" (1937) 13 Wheat Studies No. 7, 305 *et seq.*

[47] U.S.S.R. Laws 1932, text 375; see *supra* pp. 100 and 346.

[48] U.S.S.R. Laws 1932, texts 190, 233; *id.* 1933, text 25, Section 15, and text 396.

late cattle breeding, it was ruled in 1939 that the levy of meat should be determined, not by the actual size of the collective herd, but by the acreage held by the farm,[49] and this method was gradually extended to other animal products, to grain, and to so-called industrial crops such as sugar beets, flax, hemp, cotton, et cetera.[50]

The collective farms also pay some taxes in money, the most important being the income tax of 4 per cent, from the income derived from sales to government procuring agencies and from the value of produce used for internal collective needs, and of 8 per cent, from the produce distributed among members, sold on the market, and other cash incomes. From the taxable income are deducted sums received for produce delivered to the government, as a tax in kind; forage used for animal breeding farms; compensation to the machine-tractor stations; sums obtained for sale of cattle and invested

[49] U.S.S.R. Laws 1939, text 316, Preamble, Sections 18, 19.

[50] U.S.S.R. Laws 1940, text 82, Sections 1, 2, re wool; *id.*, text 235, gives a general statement of the new policy; *id.*, text 236, Sections 1, 2, re grain and rice; *id.*, text 237, Section 2, re potatoes; *id.*, text 252, Section 3, re hides; *id.*, text 322, Section 2, re vegetables, text 323; *id.*, text 324, Section 2, re oil-producing crops; *id.*, text 359, Section 2, re hay.

Industrial (technical) crops, such as sugar beets, flax, hemp, etc., were collected until 1940 by means of so-called "special contracts" (*Kontraktatsia*), a method which was also applied to other crops before the soviet government introduced the compulsory delivery of agricultural products. Under this method, a nationwide plan for acreage sown with the estimated quantity of produce was prepared for the coming year. The plan provided for a specific acreage to be cultivated in each region, province, and county. Moreover, several government research and experimental stations and institutions sought to find the best methods of cultivation of industrial (technical) crops, which methods, if successful, were made mandatory upon the cultivators and included in the plan. On the basis of such plans, the local government agencies in charge of farming, primarily the machine-tractor stations, made contracts every year with the collective farms. The farms stipulated that they would cultivate a definite acreage and employ certain methods of cultivation, while the government agencies promised such assistance as the case might require, for instance, that they would supply certain amounts of a specified kind of seed, advance certain amounts of money, and furnish certain machinery. The farm agreed to deliver all crops to the government agencies, and the government agreed to pay an established price.

in the increase of the herd; investments in the development of auxiliary establishments and insurance premiums.[51]

Theoretically, the land is given to the user free of charge under the soviet law, but this is no more than pure formality. It simply means that no particular levy is called rent but that numerous levies in money and in kind are assessed against the user tantamount to a heavy rent.

8. Distribution of Income Among the Members

The portion of the income of the collective farm left after all deliveries to the government have been made and reserves put aside, is distributed among the members in proportion to the labor contributed by each of them to the proceeds of the farm. Individual shares are computed by the number of so-called "labor days" credited to each member.[52] A "labor day" is an artificial unit of computation. A specified amount of work done by a member during regular working hours brings him a credit of one or more labor days or a fraction of a labor day, depending upon the type of work and the results achieved. The federal government has established a general scheme by which all agricultural jobs are classified in seven groups.[53] To the highest group belong the chairmen of large collective farms, operators of complex machinery, and men holding similar jobs

[51] Edict of March 1, 1941, Vedomosti 1941, No. 12, which repealed the previous acts. U.S.S.R. Laws 1936, text 339 and *id.* 1938, text 48. See also Rovinsky, editor, Financial Law (in Russian 1946) 87 *et seq.*

[52] Standard Charter 1935, Sections 12, subsection (f), 15.

[53] Order of the U.S.S.R. People's Commissar for Agriculture of February 28, 1933, Izvestiia No. 59, March 1, 1933, (1933) Economic and Financial Legislation No. 8, 10; also, Order of June 13, 1934, No. 2295, (1934) *id.* No. 19.

requiring special qualifications. The accomplishment of a full day's work in this group was originally credited as two labor days. Later, tractor drivers were guaranteed a minimum credit of three labor days for one working day and three kilograms of grain and 2.50 rubles as the minimum equivalent of one labor day.[54] They were also given an opportunity to earn up to five labor days in one day by showing extra efficiency and saving fuel.[55] Jobs in the next lower group bring a credit of one and three-quarter labor days for a full day's work. This difference of one quarter of a labor day between two adjacent groups is kept throughout the scheme. In the lowest bracket, which is credited with only half a labor day, are included simple jobs, such as those of members engaged in daily chores, guards, and messengers. Each collective farm makes its own adaptation of this scheme, with more details and specifications as to the results required. Various fractions of a labor day may be added or deducted from a normal credit in the event that the work done exceeds or does not attain the established standard. Thus, remuneration for a higher bracket may be eight to ten times that of a lower category.

Since 1940, chairmen have been remunerated under a schedule originally established by the government for the Eastern regions only, and then gradually extended to others. A minimum of labor days and a certain

[54] U.S.S.R. Laws 1933, text 361; Order of the U.S.S.R. People's Commissar for Agriculture of June 15, 1937, No. 494, (1937) Economic and Financial Legislation No. 28, 24; U.S.S.R. Laws 1938, text 11; *id.* 1939, text 116, Section 9. A tractor driver who receives his training in an M.T.S. may not leave for two years, under penalty of expulsion from the collective farm.

[55] Statute on Tractor Drivers, *id.* 1933, text 361, Annex No. 2, also Vedomosti 1940, No. 25, Edict of July 17, 1940, freezing tractor drivers on the job. U.S.S.R. Laws 1939, text 116, Sections 4, 5. For extra efficiency, credit may be increased up to 50 per cent.

amount in cash per month is guaranteed to each chairman. The number of labor days depends upon the size of the collective farm area sown, and ranges from 45 to 90 (for areas over 1,500 hectares) labor days per month. Chairmen serving a third year receive a 3 per cent increase, those serving their fourth year 10 per cent, and those serving five or more years receive 15 per cent. Thus, chairmen may reach 105 days a month. The salary in money ranges from 25 rubles a month to 1,000 rubles, depending upon the amount of the annual gross income of the farm.[56]

By the end of the fiscal year, the numbers of "labor days" credited to the individual farmers are added to find the grand total of labor days for the whole farm. The portion of the collective income assigned for distribution among the members is divided by this total, and the quotient shows the value in money and in produce of one "labor day." By multiplying this quotient by the number of labor days credited to a member, his share in the emoluments of the farm is determined. Before the end of the fiscal year, certain advances on account, as specified by the government, may be given to individual members.

The value of a labor day varies considerably from locality to locality and from farm to farm. There are "rich" collective farms having "poor" individual shares and "poor" farms from which the individual may have a good share.[57]

[56] This type of remuneration was established first for the Eastern regions, U.S.S.R. Laws 1940, text 271, and later extended to other regions, *id.*, texts 462, 484, 541, 583, 626.

[57] An American observer reported that in 1935 he visited a collective farm of a better type near Odessa where there were 126 working members, 69 of them women, and they had earned altogether in 1934, 27,000 labor days. Volin, "Agrarian Collectivism in the Soviet Union" (1937) 45 Journal of

In order to increase personal interest in and responsibility for the collective work, the collective farms are broken up into gangs called brigades. Each brigade works under a foreman (*brigadir*) appointed by the management and is assigned an individual plot of land for crop farming or a herd for animal husbandry. The brigade profits from the good results of its own work but is also responsible for failure to match the achievements of other brigades on the same farm. Thus, if one brigade produces more than the average of the other brigades on the farm, its foreman may be credited with extra "labor days" to the amount of 20 per cent of the total of his "labor days"; the best workers (*udarniki*) may be credited with 15 per cent and the rest of the brigade with 10 per cent of their labor days. In case of bad work, a reduction of 10 per cent of the total number of labor days credited to the gang may be made.[58] For crop farming, each gang is assigned not only land but also livestock, implements, and buildings, for not less than a full rotation period; for animal husbandry, the assignment of a herd is made for a period of not less than three years.[59] Thus, the brigades are like little specialized farms within the collective farms. It was also recommended that the brigades be subdivided into smaller "links" (*zveno*) of six to seven workers with more specific assignments, and that they be given merits

Political Economy 628, note 24. A soviet writer reported that in a collective farm in the Kirsanovsk district (Central Russia), the average number of labor days credited to a member was 219 in 1935, but some members earned from 712 to 881 labor days, and one, 1,171. Azarin, (1936) Problems of Economics (in Russian) No. 4, quoted from Volin, *loc. cit.*

[58] Standard Charter 1935, Section 15. Brigades were first recommended by the Central Committee of the Communist Party on February 6, 1932. Izvestiia, February 6, 1932.

[59] Standard Charter 1935, Section 14.

and demerits according to the rules established for the brigades.[60]

A special encouragement for efficiency of all executive personnel engaged in farming, from the foreman of a *zveno* on up, was established by the Edicts of March 29, and September 18, 1947. Titles and orders such as the Hero of the Soviet Union, the Lenin Order, and the Medal of Labor Merit, are given to foremen and chairmen of collective farms, technical and executive personnel of the machine-tractor stations, and local communist officials of the collective farms or minor units under their jurisdiction which have attained a certain level of yield per acre specified by edict for various kinds of crops.[61] These titles and decorations carry with them benefits and privileges which are discussed elsewhere.[62]

The system of labor days taken as a whole aims to establish fair compensation for personal efficiency and offers an ambitious collective farmer a career as tractor driver, *brigadir,* or president of the farm as a means of increasing his own earnings within the framework of collective farming. However, it requires detailed recording of the work of each member and intricate accounting. The system of records and accounting is regulated by the federal laws prescribing various forms.[63] But a high standard of efficiency and honesty in keeping the record is undoubtedly the prerequisite for a fair application of the designed scheme. There is, however, ample evidence to the effect that the labor-day

[60] U.S.S.R. Laws 1938, text 86, Section 3; *id.,* text 94, Section 13; *id.* 1941, text 26.

[61] Vedomosti 1947, Nos. 12 and 35. See also Chapter 22, note 63, p. 810.

[62] See *supra,* Chapter 3, p. 95.

[63] U.S.S.R. Laws 1935, text 125; *id.* 1938, text 129, which substituted from 11 to 14 forms for 50 forms of accounts required from collective farms; the latest comprehensive regulation of accounting, *id.* 1939, text 74.

credit system fails to express true efficiency and productivity. Thus the Act of September 19, 1946, points out the practice of "improper crediting of labor days," consisting in "an undue increase of executive and service personnel and an exceedingly high waste of labor days and money for the cost of administration," as well as in crediting labor days to various officers of local soviets. These might be called outright abuses. The government now tries to check such abuses, and in March, 1947, some 182,000 persons were ordered to be no longer credited with labor days. However, Andreev, in his report to the Central Committee of the Communist Party, made in March, 1947,[64] also pointed out the defects of the system even if applied honestly. It very frequently happened, according to him, that one unit (a brigade or *zveno*) spent more time and was credited with the same or a higher amount of labor days than other similar units, but obtained a lower yield. Taken in itself, each job was done according to the literal standards justifying high credit, but the field work was either badly organized, badly performed, or was delayed too long so that the final result—the yield—was poor. For example, in the farm Red Dawn of the Kursk region, one brigade was credited with 2,200 days and obtained 800 kilograms of crops per hectare while another unit, comprising the same number of workers and a similar area sown, was credited with 2,300 labor days for the crops with 340 kilograms per hectare. Andreev suggested that labor-day credit must be connected in some way with the yield, and the government is working on such a system. But no act to this effect has been passed thus far.

64 Andreev, *op. cit. supra,* note 24. For a translation of the Act of September 19, 1946, see Vol. II, No. 35.

When the Standard Charter was enacted, the soviet leaders expected there to be enough incentive for a collective farmer to work for a high credit of labor days. But it seems that the collective farmers found other ways to increase their earnings, evidently by spending most of their efforts on their private house-and-garden plots. Thus, the Law of May 27, 1939, which in general sought to check various other undesirable individualistic practices within the collective farms, stated that, in contrast to members who earn as many as 200 to 600 labor days, there are others who have no more than 20 to 30 labor days credited annually. The same law recommended that the collective farms establish from 1939 on an obligatory minimum of 100 labor days in cotton-growing regions and from 60 to 80 days in other regions as a prerequisite to membership. Members who fail to attain the minimum of required credit were to be expelled.[65] On April 13, 1942, the required minimum was increased to 150, 120, and 100 labor days annually, and a certain credit must be earned on definite calendar dates. Those who fail to attain such credit must be not only expelled but also punished in court.[66] Expulsion also entails deprivation of one's house-and-garden plot. Thus, at present, the labor-day system aims to make efficient participation in the collective work not only profitable to but also mandatory upon the member.

9. Limitations on Admittance to Membership

The provisions of the Charter admit to membership only "toilers," men and women of the age of sixteen and

[65] U.S.S.R. Laws 1939, text 235, Section 14. The minimum number of labor days in a fishermen's artel is regulated in U.S.S.R. Laws 1940, text 370.

[66] U.S.S.R. Laws 1942, text 61. See Chapter 21, notes 46 and 73; for translation, see Vol. II, No. 34.

over, and expressly bar kulaki and the "disfranchised." Since the 1936 Constitution does not deprive anyone of the franchise by reason of his origin or occupation, and otherwise promises equal treatment to all citizens, these provisions should have been abolished, but they are still on the statute books. However, the Charter makes an exception for children of the above-mentioned persons who for a number of years have been engaged in useful work and have performed it efficiently. Likewise, membership is open to kulaki and members of their families who, though exiled for anti-soviet or anticollectivization activities, have proved by their work at their place of exile for three years that they have reformed.[67]

Peasants who have sold their horses within two years before joining a collective farm, or who have no seed grain, are admitted on condition that they contribute from their earnings the value of the horses and the seeds in kind in installments within six years.[68]

Persons who have not been engaged in farming, e.g., teachers, workers, may also join a collective farm, in which case they pay only the entrance fee.[69]

II. Government Control

1. Machine-Tractor Stations

In 1933, Stalin gave a general statement of policy implying strict control over the collective farms. According to him, the Communist Party "must take over the direction of the collective farms, assume responsibility for the work, and help the collective farmers to conduct their husbandry on the basis of science and

[67] Standard Charter 1935, Section 7.
[68] *Ibid.*
[69] Law of Collective Farms (1938) 256.

technology."[70] Pursuant to this program, several laws established a system of government and Party control over the collective farms. The so-called machine-tractor stations (M.T.S.) became the principal vehicle of this control. All more or less complicated agricultural machinery (tractors, combines, et cetera), all threshing machines,[71] and the bulk of the new mechanized resources designed to replenish the loss of horses (see *supra*) were not given to the collective farms but were concentrated in special depots, the machine-tractor stations, each serving several collective farms. There were 6,356 machine-tractor stations in 1939.[72] The machine-tractor station neither lends its machinery to the farms nor performs the operations itself. The collective farmers themselves perform all agricultural operations, using the machinery of the station under the supervision of its technical personnel, who train them for this purpose. The farmers are paid in labor days by the farm, but some of them, viz., the tractor drivers, are paid through the machine-tractor stations.[73] The collective farm pays in kind for the services of the M.T.S., which also collects the deliveries of grain and other products for the government.[74]

[70] Stalin, Work in the Rural Districts, January 11, 1933, Problems of Leninism (English ed. 1940) 446.

[71] A stipulation that the collective farms sell to the M.T.S. all complex threshing machinery and locomobiles was included in the Standard Contract of a Collective Farm with the M.T.S. of February 5, 1933, Section 8 (U.S.S.R. Laws 1933, text 47). On May 24, 1933, the Council of People's Commissars and the Central Committee of the Communist Party ordered the local authorities to conclude all such purchases before June 26, 1933. Izvestiia, May 25, 1933; (1933) Bulletin of Farm Legislation No. 12, 2.

[72] Land Law Textbook (in Russian 1940) 105.

[73] U.S.S.R. Laws 1939, text 116.

[74] Standard Contract of a Collective Farm with the M.T.S., U.S.S.R. Laws 1939, text 15; also *id.*, texts 13, 14.

The M.T.S. originated from an experiment made in 1927 by a *Shevchenko* governmental soviet farm near Odessa. The farm assigned some of its machinery to render services to neighboring villages which would form collective farms. On June 5, 1929, the organization of M.T.S. as a general measure was ordered.[75] However, at that time the M.T.S. were visualized as co-operative undertakings of the collective farms. A joint-stock company was created, the "All-Union Center of Machine-Tractor Stations," which issued shares to be distributed among the peasants. A new station was to be created wherever the peasants would subscribe shares to the extent of 25 per cent of the cost of the station. Molotov commented in 1938:

> At that time, we did not yet have a clear idea that the M.T.S. must be governmental. . . . But soon experience showed that the M.T.S. might play a decisive role in collectivization. The form of a joint-stock company was obviously not appropriate for their organization. M.T.S. should have become and did become the basic governmental organizations in the countryside, and the soviet government has made them potent levers of collectivization.[76]

By intention of the law, the machine-tractor stations were to be "not only centers directing agricultural technique and operations but also political centers guiding the organization of and the influences affecting the broad masses of collective farmers."[77] Special political sections and, later, political assistant directors[78] were established at the machine-tractor stations and govern-

[75] U.S.S.R. Laws 1929, text 353.

[76] Pravda, February 24, 1938; Law of Collective Farms (in Russian 1939) 230.

[77] U.S.S.R. Laws 1933, text 234.

[78] Resolution of the Central Committee of the Communist Party, November 28, 1934, Sections 5, 6; The Most Important Decisions Concerning Farming, A Symposium, Kilosanidze, editor (in Russian 2d ed. 1935) 198; Law of Collective Farms (in Russian 1939) 145; 1 Civil Law (1944) 181, 182.

mental farms to be "the eyes and control of the Communist Party in all spheres of the life and work of the machine-tractor stations, the government farms themselves, and the collective farms served by the machine-tractor stations." Their first duty is:

> To secure the unconditional and timely fulfillment by the collective farms of all their duties toward the government and especially to fight decisively dissipation of the property of collective farms and attempts to sabotage the steps taken by the Party and the government to collect grain and meat from the collective farms. . . . They must fight in particular the attempts of the directors of the governmental farms and their assistants to pursue the narrow interests of these farms at the expense of the general interests of the government and to conceal surpluses instead of delivering them to the government. . . . They must detect subversive activities . . . they must prevent and suppress violations and distortions of the decisions of the Party and the government.[79]

[79] Resolution of the Central Committee of the Communist Party of January 11, 1933, *op. cit.*, note 78, 169, 170, 171. Pursuant to this resolution, 17,000 "picked and seasoned bolsheviks" were sent to form the personnel of the political sections and later made political assistant directors of the M.T.S. They conducted a thorough shake-up of the entire personnel of the collective farms, M.T.S., governmental farms, and Party organizations. See, Law of Collective Farms (in Russian 1939) 98. From one third to one half the total number of officers of collective farms were removed in 1933. See Timoshenko, *op. cit. supra,* note 46 at 314 and soviet sources cited there. One of the participants in this campaign gave the following detailed account:

> The political sections discharged in all the governmental farms of the R.S.F.S.R. in 1933, 70,000 workers, or 17.5 per cent of the total employed, in individual cases the percentage of the discharged being as high as 30–40 per cent. In Siberia, the Ural region, and Kazakstan, i.e., the greater part of Russian territory in Asia, 20 per cent of the members of local communist organizations were expelled from the Party. For 246 governmental farms, the following distribution of the dismissed workers classified according to the reason for their dismissal was officially given: out of a total of 13,076 dismissed, 5,246 (40.4%) were fired as kulaki, 548 (4.2%) as white guardists, 114 (1.1%) as priests, 2,290 (17.5%) as criminal elements, 2,801 (21.4%) as loafers, and 2,047 (15.4%) for other reasons. The management resisted in many cases the discharge of kulaki, especially those who were such good workers that, as managers often said, they "wouldn't take ten communists for one such kulak."
>
> See Soms, Political Work of the M.T.S. and Governmental Farms (in Russian 1934) 15, 16, 17, 20.

The relations between a collective farm and the M.T.S. are regulated by a contract made between them every year. However, the margin of freedom allowed in the terms of the contract is very narrow. A "standard contract" is from time to time promulgated by the federal government,[80] prescribing the terms in minutiae and placing the M.T.S. in charge of all agricultural operations of the collective farms in every detail, in accordance with the general governmental plan as specified for a given locality. No deviations from the "standard contract" are permitted, because, according to the comments of the soviet jurists, such contract "has the force of law." The contract is, according to them, "a form of governmental guidance for the collective farm, a means of execution of the policy of the Communist Party aiming to strengthen socialist agriculture. . . . The machine-tractor station is not merely a party to the contract made by it with the collective farm, but the leader of the collective farm and organizer of its production." [81] Suggestions made by the M.T.S. with regard to farming technique are mandatory upon the collective farm.[82] Thus, comments the civil law textbook of 1938, a contract made between the M.T.S. and a collective farm has two aspects:

[80] The first Standard Contract was issued in 1930, the second was enacted on February 5, 1933, U.S.S.R. Laws 1933, text 47. The "force of law" was declared to be attached to contracts made in accordance with the Standard Contract, U.S.S.R. Laws 1933, text 234. The following Standard Contracts were subsequently enacted: February 17, 1934, U.S.S.R. Laws 1934, text 68, as amended *id.* 1934, texts 129, 156, 274, 277, 322; *id.* 1935, text 118; March 5, 1938, Reference Book of the Soviet Worker (in Russian 2d ed. 1939) 351; and January 13, 1939, U.S.S.R. Laws 1939, texts 13, 15. See also Law of Collective Farms (in Russian 1939) 99 *et seq.*, 231 *et seq.*

[81] Ruskol, "Legal Relations of the M.T.S. and the Collective Farms" (in Russian 1938) Problems of Soviet Law No. 5, 101, 103; Law of Collective Farms (in Russian 1940) 183; 2 Civil Law Textbook (1938) 185.

[82] Ruskol, *op. cit.* 101.

On the one hand, it is an agreement between two equal parties regulating their business relations. On the other hand, the directive role of the M.T.S. as a political and economic center of leadership of the collective farm finds its expression in the contract. Therefore, contracts between the M.T.S. and the collective farms are one of the forms by which the government directs the collective farms, one of the means of realizing in the country the policy of the Communist Party designed to fortify socialist forms of farming.[83]

The rate of compensation due to the M.T.S. for its services is defined by the federal government. At one time, a certain percentage of the crops was prescribed for all work done. Since 1939, the percentage of produce to be delivered has been defined for each individual operation, such as ploughing, harvesting, threshing, et cetera.[84] Remuneration for certain services is paid in money. The contract also specifies the duties of the collective farm involving the execution of the government plan of agricultural production and procurement. Failure to perform the stipulations imposes upon the party concerned the duty to compensate at fixed prices for damage to the extent of one and one-half times the value of the work not performed. Delay in delivery of assessed products to the government entails for the collective farm a fine of 1 per cent for every ten days' delay. In the event of malice, the collective farm may be fined in addition one half the price of the products not delivered, and the managers of the collective farm may be penalized in court.[85]

That the compensation payable to the M.T.S. includes, in a veiled form, a tax in kind, is evidenced by

[83] 2 Civil Law Textbook (1938) 184; Law of Collective Farms (1939) 234 *et seq.*, Ruskol, *loc. cit.*

[84] U.S.S.R. Laws 1939, text 15, Section 4.

[85] *Id.*, Section 25.

the fact that collective farms not served by the M.T.S. are assessed deliveries in kind 25 per cent higher (prior to 1947 only 15 per cent) than farms served by the M.T.S. As explained by Andreev in March, 1947, this is due to the fact that collective farms served by the M.T.S. supply to the government 40 to 50 per cent more agricultural produce than other farms.[86]

2. Management

Each collective farm must have its own charter drafted in accordance with the Standard Charter and local regulations implementing the same. After adoption by a general meeting of the members, the charter must be registered with the district executive committee, which checks to see that the charter is drawn according to the law and has been passed in accordance with the established procedure.[87] After registration, the collective farm enjoys the rights of a legal entity. It may, however, conduct only such business as is compatible with its purpose as a farming unit (see *supra* I, 3).

The Standard Charter ostensibly seeks to organize the collective farm on a democratic basis. Thus, the general meeting of the members is called "the supreme authority in the management of the artel."[88] The general meeting elects a chairman and a board of managers of from five to nine members for a term of two years. It admits and expels members of the collective farm. The approval of the general meeting is required for decision of major business matters such as the annual plan of work, standards of work, the value of a labor day in

[86] *Loc. cit. supra,* note 24.
[87] Law of Collective Farms (in Russian 1939) 126.
[88] Standard Charter 1935, Section 20.

money and products, the contract with the machine-tractor station, the annual account of the board of managers, the rules of internal organization, including penalties imposed upon members for infractions of labor discipline, and the determination of the amounts of special funds to be set aside.[89] All questions including elections are decided at the general meetings by open ballot. However, "in the intervals between general meetings," the authority of the general meeting is vested in the board of managers, its decisions on the above questions being subject to the approval of the general meeting. The board of managers "runs the current business of the artel . . . acts as the executive committee of the artel, and is responsible for the working of the artel and the fulfillment of its obligations toward the State."[90] *Brigadirs* (foremen) and managers of stockbreeding farms, i.e., officers immediately responsible for farming jobs, are appointed by the board of managers.[91] Moreover, the chairman of the artel, who is also chairman of its board of managers, "manages the day-to-day business of the artel."[92] In fact, he is the actual manager of the artel, its director and chief executive. The soviet laws invariably hold the chairman directly and personally responsible for defects in the work of the farm and for violations of the rules and regulations.[93] The chairman is elected by the general meeting from among the members of the collective farm. Nevertheless, the textbook on the law of collective farms of 1939 states:

[89] *Ibid.*
[90] *Id.*, Sections 19, 21.
[91] *Id.*, Section 23.
[92] *Id.*, Section 22.
[93] E.g., U.S.S.R. Laws 1938, text 115; *id.* 1939, text 235, Sections 1, 6.

See Vol. II, Nos. 33, 34.

> This does not preclude governmental agencies and public organizations [this means the Communist Party] from recommending to the general meeting one or another comrade for the office of chairman, if there is no suitable candidate among the members. However, such nomination does not mean appointment. . . . Before the election, the nominee must be admitted to membership in the collective farm.[94]

A later textbook again assures that:

> Recommendations have nothing in common with direct appointment. However, to the present time it has occurred that outside candidates were sent in instances where a suitable chairman could have been elected from among the members of the collective farm. Thus, for example, in the Orsha district of the Vitebsk region, a collective farm, "Peremoga," had altogether only two chairmen of its "own" at the very beginning; all successors were invariably sent by the district authorities. Similar practices are in evidence in other collective farms of the district.[95]

> The textbook relates that, according to the tabulations of the Central Statistical Administration, there were only 9.2 per cent of the chairmen with an experience of over five years on the job, while 46 per cent had less than one year's experience.[96] In March, 1947, chairmen with less than one year's experience constituted 38 per cent, those with from one to three years' experience, 34 per cent, and those with three and more years' experience, 28 per cent. In one of the regions, one half of all chairmen were changed in 1946.[97]

From the soviet laws and decrees, one gets the impression that all the rules designed to safeguard the autonomy and self-government of collective farms are more often violated than obeyed. Thus, it seems that until 1932 the local administrative authorities managed

[94] Law of Collective Farms (in Russian 1939) 334.
[95] Law of Collective Farms (1940) 297, 298.
[96] *Ibid.*
[97] *Op. cit. supra*, note 24 at 4.

all the affairs of the collective farms, including the appointment of their officers. At least, a law was then passed which pointed to the continuous violation of the principle of election of officers of the farms, and expressly prohibited governmental agencies from "inadmissible methods of commandeering" and arbitrary disposal of the property of the farms.[98] Nevertheless, these practices do not seem to have been discontinued after the Standard Charter of 1935 was enacted. The preamble of a law passed on December 19, 1935, still:

> . . . Emphasized that the Charter is being continuously violated. The procedure prescribed for appointment and election of managing personnel (chairmen of farms and brigadiers) is violated in a criminal manner. Chairmen are often dismissed without sufficient cause, transferred from one farm to another, unlawfully indicted and fined for trifling matters worthy of a public reprimand or an instruction by the administrative or Party agency.[99]

Another official report in 1936 stated:

> In many localities the unlawful disposition of the funds of collective farms (by the authorities) and the practice of wholesale unlawful fining of members of the collective farms are still continued.[100]

Similar complaints were made in various laws of 1938, in the textbook on the law of collective farms of 1940, and in the Act of September 19, 1946.[101]

It seems that local administrators still tend to "boss" the collective farms and exceed the powers granted them by law. There is no doubt that the soviet government wants the business of the collective farms to be run

[98] U.S.S.R. Laws 1932, text 298.
[99] U.S.S.R. Laws 1935, text 520, Preamble, paragraph (e).
[100] Lebedinsky, "The Fight of Government Attorneys Against Violations of and Departures from Stalin's Charter" (in Russian 1936) Socialist Legality No. 4, 17.
[101] *Loc. cit.*, note 95. See also Vol. II, No. 35.

along the lines of self-government; on the other hand, when left alone, the collective farms resort to policies prejudicial to governmental plans for farming. Almost invariably a decree threatening to penalize undue interference with the internal management of the farms also enacts restrictions of one sort or another upon the freedom of business of the farms.[102] Local administrators, governmental agencies, and agencies of the Communist Party are held responsible for the execution of restrictions and the checking of violations. The collective farms should function freely, but they are supposed to exercise this freedom in pursuit of the aims designated by the government. These two propositions do not necessarily coincide. Hence, the local administrators are caught between the devil of overzealousness and the deep sea of laxity. On the one hand, they must abstain from direct appointment of chairmen; on the other hand, they are expected to judge the fitness of nominees and recommend their own candidates. On the one hand, the Law of April 19, 1938, prohibits expulsion from collective farms except by decision of the general meeting with two thirds of the members present. On the other hand, the Law of May 27, 1939, recommends the expulsion of chairmen and members who are guilty of various violations stated therein and holds the local authorities directly responsible for acts committed by individual farmers or managers.[103] Such responsibilities furnish continuous incentive to local administrators to interfere with the management of the farms. The central government itself acts in this manner. To quote a recent example: the Act of September 19, 1946, calls for

[102] E.g., U.S.S.R. Laws 1939, text 235, translated in Vol. II, No. 33.
[103] See translations of these laws, Vol. II, Nos. 32 and 33.

the observance of elections of management in the collective farms and the responsibility of their officers before the membership, but in March, 1947, it was reported to the Central Committee of the Communist Party that 456,000 officers of collective farms were discharged for one violation or another, as a result of government action.[104] Thus, the outline of the business management of a collective farm given in the Standard Charter appears to be no more than an ideal scheme which has not been fully realized.

It must be mentioned, too, that the general meeting also elects an auditing committee which requires approval by the district executive committee. However, the Law of April 19, 1938, states that, "as a rule, the auditing committees are either inactive or are transformed into subsidiary machinery of the managements for making formal statements concerning accounts at the end of the year." [105]

3. Responsibilities of a Collective Farmer

The provisions of the Standard Charter seek not only to reward the efficiency of a collective farmer for performance of the collective work but also to penalize him for neglect of his collective duties. Several penalties may be directly imposed upon him by the management. Section 17 of the Charter first recites the general duties of a collective farmer and then proceeds as follows:

17. [Paragraph 2] Members who fail to take good care of or who neglect the collective property, who fail to report for work without a justifiable reason, who work badly, or who violate labor discipline or the Charter, shall be punished by the

[104] *Op. cit. supra*, note 24. See also Vol. II, No. 35.

[105] U.S.S.R. Laws 1938, text 115, Preamble, par. 6; also *op. cit.*, note 94, 336.

management in accordance with the rules of internal organization. For example, such member may be ordered to do the poor work over again without any credit in labor days, he may be warned, reprimanded, or reproved at the general meeting, or his name may be put on the blackboard, he may be fined up to five labor days, he may be demoted to a lower paid job or suspended from work.

In cases where all measures of an educational and penal nature applied by the artel have failed, the management shall bring before the general meeting a motion for expulsion of the incorrigible member.

The imposition of all these measures is left in theory to the farm itself. However, in certain instances, expulsion is mandatory, viz., when the farmers fail to attain the required minimum credit of labor days. Moreover, the Charter also provides directly for prosecution of a farmer in court:

18. Any dissipation of collective and government property as well as reckless handling of the property and livestock of the collective farm and the machines of machine-tractor stations shall be deemed by the artel a betrayal of the common cause of the collective farm and aid to enemies of the people.

Persons guilty of such criminal undermining of the mainstays of collective farming shall be delivered to the court to be punished in accordance with all the severity of the laws of the workers' and peasants' State.

Among the penal laws which shall be applied in such instances, the Law of August 7, 1932, threatening the death penalty (twenty-five years' confinement after May 26, 1947) with a minimum of ten years' imprisonment should be mentioned in the first place. It is discussed *supra*.[106] Here it may be mentioned that the law is still applied, and, in 1942, the President of the U.S.S.R. Supreme Court wrote that "judges who avoid the application of this law uproot the policy of the Party and the

[106] See *supra* at p. 728.

government regarding the fight against pillagers of the people's property." [107] The U.S.S.R. Supreme Court in 1940 recommended its application in cases where a collective farmer has tilled and harvested privately a field which was to be exploited collectively and has done so with full knowledge of the status of the field.[108] Besides this, several federal penal laws have been enacted and incorporated into the criminal codes of the soviet republics providing for punishment of acts committed by collective farmers. The R.S.F.S.R. Criminal Code provides as follows:

79 [1]. The malicious slaughter or intentional maiming of livestock or the solicitation of another to commit such offense, with the purpose of undermining or hindering the collectivization of agriculture or obstructing its advance, shall be punished by:

Imprisonment for not more than two years with or without banishment from a given locality (as enacted January 20, 1930, R.S.F.S.R. Laws, text 26).

79 [2]. The spoiling or damaging of any tractor belonging to any governmental farm, machine-tractor station, or collective farm by criminally careless treatment shall be punished by:

Forced labor [without confinement] for not more than three months.

Any such offense, if repeated, or if it causes serious damage, shall be punished by:

Imprisonment for not more than three years.

Note: If the breakage or damage is insignificant, the offender may, instead of being prosecuted in court, be punished in accordance with the rules of internal organization of the farm and by deductions from his pay as provided by law (as enacted March 20, 1931, R.S.F.S.R. Laws, text 163; U.S.S.R. Laws 1931, text 474).

79 [3]. Unlawful slaughter (i.e., slaughter without authorization by the veterinary authorities) or intentional maiming of horses, or any malicious act which results in the loss of a horse

[107] Goliakov, "The Fight Against the Pillage of Socialist Property Must Be Intensified" (in Russian 1942) Socialist Legality No. 2, 3–4.

[108] Criminal Code (in Russian 1943) 169.

or renders it unfit for use, shall be punished, if committed by a kulak or a private dealer, by:

Imprisonment for not more than two years with or without banishment from a given locality.

Solicitation of another by any such person to commit any such offense shall be punished:

In like manner.

Any such offense committed upon horses belonging to a collective farm, a governmental farm, a machine and horse station, or other institution or enterprise in the socialized sector [of national economy] shall be punished, if the offender is an employee of any such farm, institution, or enterprise, or a member of a collective farm, by:

Forced labor [without confinement] for not more than one year (as enacted April 29, 1932, R.S.F.S.R. Laws, text 304; U.S.S.R. Laws 1932, text 107).

79[4]. Criminally negligent handling of any horse and, in particular, of a mare in foal, in any collective farm, governmental farm, machine and horse station, institution, or enterprise in the socialized sector [of national economy], if the handling results in the loss of the horse or renders it unfit for use, shall be punished by:

Forced labor [without confinement] for not more than six months.

Any such offense, if committed systematically, or if it results in the loss of a considerable number of horses, shall be punished by:

Imprisonment for not more than three years.

Note: If the carelessness does not result in the consequences described in the preceding paragraph, a disciplinary penalty in accordance with the rules of internal organization of the farm, together with the obligation to make good the damage, may be imposed instead of prosecution in court (as enacted April 29, 1932, *id.*).

However, the offenses specified in Sections 79[2] and 79[4] above, if committed intentionally, may be prosecuted as counterrevolutionary economic activities or under the Law of August 7, 1932, on Protection of Public Property, which threatened, prior to May 26, 1947, the death penalty, and after that date, twenty-five years of con-

finement in a camp of correctional labor.[109] Officers of collective farms guilty of the slaughter and sale of young animals not duly recognized as defective, if such activity has resulted in mass destruction, are to be prosecuted under the same law, according to the Directive of the U.S.S.R. Commissar for Justice of April 22, 1943.[110] In addition to disciplinary penalty or punishment in court, the collective farmer is also liable for damages in a civil action. States the U.S.S.R. Supreme Court:

> If a member of a collective farm was penalized under Section 17 of the Standard Charter of an Agricultural Artel for careless handling of collective property, this does not relieve him of financial liability, under Section 403 of the Civil Code, for damage caused to the property of a collective farm by his improper acts or his failure to act properly while at work.
>
> In determining the amount of damages the court should take into consideration not only the injury inflicted but also the actual background on which the injury was caused and the economic status of the collective farmer who caused it.[111]

Under the Charter, expulsion must be decided by the general meeting by a majority vote with two thirds of the members present. Again, the soviet laws complain of continuous violations of this rule. Thus, the above-mentioned law of 1935 states:

> The rules of the Charter concerning the expulsion of members of the collective farms are very often violated; members are expelled for such contraventions of discipline as entail, according to the Charter, merely a fine or public reprimand. . . . Expulsions are often decreed by the administrative agencies, the agencies of the Communist Party, the village soviets, or the directors of the M.T.S., none of whom have such

[109] Resolution of the 3d Session of the 6th Central Executive Committee in 1933; Karnitsky and others, Criminal Code (in Russian 1934) 78.

[110] Criminal Code (in Russian 1943) 180.

[111] U.S.S.R. Supreme Court, Plenary Session, Ruling of August 14, 1942, No. 14/M/15/Y, Civil Code (1943) 219.

authority, or by the board of managers without the general meeting.[112]

Three years later the preamble of the Law of April 19, 1938, described the situation in a no less dark light:

Experience shows that the managements and the chairmen of collective farms, instead of observing the Charter of an Agricultural Artel and barring any arbitrary treatment of the collective farmers, are themselves the perpetrators of unlawful acts. A checkup has established that, in the overwhelming majority of cases, expulsion from a collective farm is devoid of any grounds whatsoever and is undertaken without any serious causes for most unimportant reasons. The most frequent type of expulsion is expulsion of members of families of which the father has left for temporary or permanent work in government enterprises. Such expulsion on the basis of family ties is contrary to the very principles of the Charter of an Agricultural Artel.

The Party and the soviet district leaders, instead of moderating and correcting such a harmful policy of expulsion from collective farms, fail to take decisive steps to preclude arbitrary treatment of collective farmers, show a heartless and bureaucratic attitude toward the fate of collective farmers and their appeals from unlawful expulsions from collective farms, let persons who arbitrarily mistreat collective farmers go unpunished, and often reduce their own role to mere recording of the facts of expulsion and submittance to superior soviet agencies of statistical reports on these matters. Moreover, these leaders themselves often induce the chairmen and the managements of collective farms to enter on the path of unlawful expulsion under the banner of purging the collective farms of socially foreign and "class enemy" elements.

The U.S.S.R. Council of People's Commissars and the Central Executive Committee of the Communist Party consider that such practice is based upon the formalistic and heartlessly bureaucratic attitude of many leaders of the collective farms, as well as of local officials of the Communist Party and the government agencies, toward the fate of living human beings, the individual members of collective farms. Such leaders fail to realize that expulsion from a collective farm means to the one expelled deprivation of his source of subsistence; it

[112] U.S.S.R. Laws 1935, text 520, Preamble, par. (e).

means not only exposure to disgrace in public opinion but also condemnation to starvation. They fail to understand that expulsion from collective farms breeds artificial discontent and bad feelings among those expelled, creates among many collective farmers a sense of insecurity in their status within the collective farm, and can only play into the hands of the enemies of the people.[113]

This law reveals that expulsions continued to be ordered without justification and by those who had no such authority, by the chairman and board of managers of the collective farm. Since that law became effective, confirmation by the district administration has been required for the validity of an expulsion.[114] However, as before, the expulsion may not be contested in court. Any complaint in this respect is decided by the administrative authorities,[115] whose attitude toward the fate of the collectivist farmers is described in the same law in rather dark colors. It should be borne in mind that the expelled member is compensated for only a fraction of his contribution in property (see *supra*) and may not withdraw the tract of land with which he joined the farm. In certain instances, he also loses his house-and-garden plot.[116] Therefore, the Law of April 19, 1938, correctly states that to expel a member means to deprive him of his source of subsistence and not only to expose him to disgrace but also to doom him to starvation.[117]

4. Disputes Involving Land Tenure

At present, all disputes concerning the tenure of agri-

[113] *Id.* 1938, text 115, Preamble.
[114] *Id.*, Section 5.
[115] Pavlov, "Stalin's Charter of an Agricultural Artel Is the Firm Law of Collective Farming" (in Russian 1938) Problems of Soviet Law No. 5, 70.
[116] U.S.S.R. Laws 1939, text 235, Section 14. For translation see Vol. II, No. 33.
[117] *Id.* 1938, text 115, Preamble.

cultural land, such as the right to use it, size of holdings, boundary disputes, and the like, are not cognizable by the courts but are decided by administrative authorities, local soviets, and their agencies.

In accordance with the general aim of the New Economic Policy to secure the toil tenure of land to every holder, the Land Code of 1922 assigned such disputes to special quasi-judicial bodies—land boards [118]—which proceeded in accordance with the rules established for trial before the people's courts.[119] The land boards existed in each territorial division with a supreme board—a quasi-supreme court—for each constituent republic. The lower boards included elected representatives of the local population; the higher boards included judges, surveyors, and trained agriculturists.[120] But in 1930 these boards were abolished,[121] and their jurisdiction was transferred to the local soviets, these being no longer bound by any rules of a quasi-judicial procedure. In 1932 new land boards were created,[122] this time only for preliminary deliberation and the giving of opinions on disputes between collective farms prior to decision by the local soviets. But in 1939 these boards were also abolished,[123] and at present all disputes concerning tenure of land, between individuals or collective farms alike, are within the province of administrative discretion of the local soviets and their agencies.[124]

Likewise, numerous disputes indirectly connected with land tenure are exempt from the jurisdiction of

[118] Land Code 1922, Sections 206–221.
[119] *Id.*, Sections 206, 216.
[120] *Id.*, Sections 209, 210 *et seq.*
[121] Act of October 10, 1930, R.S.F.S.R. Laws, text 623.
[122] Act of September 3, 1932, U.S.S.R. Laws 1932, text 388.
[123] Act of December 5, 1939, U.S.S.R. Laws 1940, text 4.
[124] Polianskaia, Land Law (in Russian 1947) 47, 78.

the courts. This is true of disputes concerning labor relations within a collective farm, infractions of labor discipline, payment for labor contributed by members (rates, individual credit of labor days, amount of money or products payable per labor day), and membership, including expulsion from the collective farm. A member of the collective farm may not contest in court decisions thus made by the management or the general meeting of the members. Appeal lies only to local administrative agencies. But the decision made may be judicially enforced at the instance of the member concerned, if the farm management evades carrying it out. In particular, he may sue the collective farm for payment of money or delivery of products allocated to him after the general meeting has made the annual distribution of income.[125] When expelled or withdrawing from the farm, he may not sue the collective farm for settlement of his accounts, but he may sue for payment of the balance due him after the accounts are settled by the management.[126]

Claims for damages and claims arising out of contracts, including contracts with the machine-tractor stations, are subject to the jurisdiction of the courts.

[125] U.S.S.R. Supreme Court, Plenary Session, Ruling of August 14, 1942. No. 14/M/15/Y, Sections 7, 8, 9, Code of Civil Procedure (1943) 160.

[126] R.S.F.S.R. Supreme Court, Plenary Session, Ruling of April 26, 1930, Protocol No. 6, *id.*

Chapter 21

Private Farming of the Household Within the Collective Farm

1. House-and-Garden Plots

Independent family crop farming and animal husbandry on a "midget" scale are permitted within each collective farm. A small house-and-garden plot adjacent to the family dwelling is allowed for the private use of each family household. Under the Standard Charter of 1935, which is now in force, the size of such plot is fixed at from one-quarter to one-half hectare (0.62 to 1.24 acres) and, in particular districts, at up to one hectare (2.47 acres), depending upon the region and nature of the farming. Local standards are fixed by the authorities and are written into the charters of the individual farms.[1] Plots of individual households in the same collective farm do not all have to be of the same size, but none of them may exceed the maximum size established for the district (rayon).[2] By fixing the maximum size of the plots, the Standard Charter of 1935 is more restrictive than that of 1930, which left determination of the size of plots to the collective farms themselves.[3]

[1] Standard Charter 1935, Section 2, pars. 4, 5, 15; 1936 Constitution, Section 7. For T.O.Z., see U.S.S.R. Laws 1939, text 527.

[2] Land Law Textbook (in Russian 1940) 142; Law of Collective Farms (in Russian 1939) 164.

[3] U.S.S.R. Laws 1930, text 255, Section 2. For a comprehensive comparison of two charters, see Pavlov, "The Stalin Charter of an Agricultural Artel Is the Fundamental Law of Collective Farms" (in Russian 1938) Problems of Soviet Law No. 5, 81.

On its house-and-garden plot, the household may conduct its own crop farming. However, the Charter parenthetically suggests that "vegetable gardens and orchards" [4] are the kind of cultivation for which the plots are assigned, and the soviet jurists emphasize that farmers should abstain from raising field crops such as rye or wheat on their private plots.[5] There is no direct statutory prohibition to this effect, but such recommendations are to be found in the soviet laws.[6]

Similarly, a limited number of animals may be owned privately by each farmstead belonging to a collective farm. The exact number of head is fixed by the authorities and depends upon the region. In the crop regions, i.e., the greater part of European Russia, it may not exceed one cow, two calves, one or two hogs, and ten sheep per family household. Horses and oxen (draught animals) may not be, as a rule, privately owned by the collectivist farmsteads; poultry and rabbits (rather uncommon in Russia) may be owned without restriction.[7]

The dwelling house and other buildings on the plot and the implements appertaining to its husbandry and produce are in the unlimited "personal" ownership of the household in contradistinction to the "socialist"

[4] Standard Charter 1935, Section 2, par. 4.

[5] Land Law Textbook (in Russian 1940) 143, Law of Collective Farms (in Russian 1939) 167, *id.* 1940, 125, recommend this but recognize that in fact field crops are raised on private plots. U.S.S.R. Laws 1940, text 236, directly provides for assessment of deliveries to the government from field crops raised on individually held plots. See also Orlovsky, "Legal Status of the Household in the Collective Farm" (in Russian 1937) Problems of Soviet Law No. 2, 15.

[6] Ruling of the Commissar for Agriculture, Izvestiia, July 6, 1937.

[7] Standard Charter 1935, Section 5. Collective farmers were given permission in August, 1933, to own a cow, and in November an aid was given to buy one. U.S.S.R. Laws 1933, texts 303, 395. Since then, the total number of cows in the Soviet Union has begun to increase. See table *supra*, Chapter 19, note 88.

ownership of the collective farm, which includes all property pertaining to farming on the collectively held fields. Compulsory deliveries of grain, meat, milk, et cetera, to the government are levied upon private husbandry separately from the assessment of the collective farm. Likewise, each household receives an individual assignment to cultivate certain crops (e.g., potatoes, hemp, et cetera) as a part of the annual governmental plan and is individually responsible for it.[8]

Nevertheless, farming and tenure of the house-and-garden plot is not totally independent from the collective farm. The previous Standard Charter of 1930 stated more accurately and liberally that the house-and-garden plots "shall remain in the personal tenure" of the households.[9] This implied that the tenure of the plot is a continuation of the former individual toil tenure granted under the Land Code of 1922 to a peasant family, who thus maintains title to it. By contrast, the Charter of 1935 visualizes the tenure of the family plots as derived from the tenure of the collective farm. It implies that the collective farm obtains title to its landholdings directly from the government, the owner of all land in the Soviet Union, under a "governmental" title deed guaranteeing the tenure "for an indefinite period, that is to say, forever."[10] On the other hand, the opening paragraph of Section 2 makes it clear that the members of the collective farm pool only their "fields" for collective use. The distinction between fields and house-and-garden plots (*usadba*) is aboriginal. Since the emancipation in 1864, both categories have

[8] E.g., U.S.S.R. Laws 1938, text 3; Law of Collective Farms (in Russian 1939) 361.

[9] U.S.S.R. Laws 1930, text 255, Section 2, *supra* note 3.

[10] Standard Charter 1935, Section 2, par. 3.

had a different status.[11] Under the imperial regime, house-and-garden plots were in the absolute ownership of families and were not subject to redistribution, even in a redistributive commune. The Land Code of 1922 retained this distinction, afforded to such plots the maximum security available under the Code, and exempted them from the redistribution allowed for the fields in villages which maintained a redistributive commune.[12]

Being specially cultivated and fertilized for years and adjacent to each house, these plots are of much greater value than the fields. When the collective farms were organized, the type of artel allowing family plots was officially declared the prevailing form; individual families retained the plots hitherto held. However, the provisions of the Charter of 1935 sought not only to limit their size by establishing the above-mentioned maximum standards but also to change their status. Although expressly providing in one place for the collectivization of fields only,[13] the language of the Charter in another place[14] suggests by implication that households have no longer any independent title to house-and-garden plots but receive them from the collective farm without any guarantee of holding them "forever." Subsequent legislation has, in fact, attached to certain instances of loss of membership in the collective farm by particular

[11] See *supra*, Chapter 18, II, 2(c).

[12] Land Code of 1922:

125. Each household is entitled to obtain a house-and-garden plot from the lots within the site of a settlement.

126. Rules concerning the redistribution of land and the units by which it is redistributed shall not apply to the house-and-garden plots of toil tenants, and such plots shall not be subject, without the consent of the holders, to any redistribution for equalization purposes, diminishment or shifting.

[13] Standard Charter 1935, Section 2, par. 1:

All hedges which before separated the land allotments of individual members of the artel shall be destroyed and all field allotments shall be converted into a single, great, solid field, which shall be for the collective use of the artel.

[14] *Id.*, Section 2, par. 4, quoted *infra*.

members of the household, the penalty of loss of the plot.[15] The Charter reads:

> A small tract of land shall be allocated from the collectivized landholdings for the personal use of each household in the collective farm in the form of a house-and-garden plot (vegetable gardens, gardens, and orchards).[16]

The textbooks on land law of 1940 and 1947 emphasize that at present the tenure of such plots is not independent but derived from the tenure of the collective farm; its prerequisite is the membership in the collective farm of the adult members of the household.[17] This explains the discrepancy between the manner in which the house-and-garden plots are allocated and the rules governing membership in a collective farm. Such plots are allocated to and held by a household as a unit, but membership in a collective farm is individual.[18] Every farmer belonging to the collective farm who is over sixteen years of age is an individual member in his own right, has an equal right to vote at the general meetings, and is individually accountable for and compensated with his own individual credit of labor days for his labor in the collective farming. Thus, he receives his own individual share in the collectively obtained income.[19]

[15] U.S.S.R. Laws 1939, text 235. Section 8, 14.

[16] Standard Charter 1935, Section 2. par. 4.

[17] Land Law Textbook (in Russian 1940) 139: Law of Collective Farms (in Russian 1940) 123 *et seq.*, 308, 309; Mikolenko and Nikitin, Law of Collective Farms (in Russian 1946) 81 *et seq.;* Polianskaia, Land Law (in Russian 1947) 64 *et seq.*

[18] The principle that membership is individual is stated in the Standard Charter 1935, Section 7; Law of Collective Farms (in Russian 1939) 249, 265.

[19] Standard Charter 1935, Section 15, last paragraph. See also, *supra*, Chapter 20, I, 8.

2. Households in the Collective Farm

In contrast to this method of distribution of collective income, no individual member of a collective farm may receive a tract of land for personal use. It is the old-fashioned undivided peasant family, the farming household (*dvor*), that obtains the house-and-garden plot and carries on upon it the family farming. This household farming is a survival of the old order. The framers of the laws on collectivization did not expect at the initial stage that the farming household would fit into the new framework of collectivized agriculture. Many soviet jurists concerned with land tenure [20] thought that the individual farming of a household would be "dissolved" in the collective farm or "absorbed" by it. At least, they did not see how the rules of the Land Code

[20] Stuchka, "General Principles of Land Tenure" (in Russian 1928) Revolution of Law No. 3, 12:

I think that it is impossible to transform the peasant household into a socialist nucleus because it is a remnant of a petty farming-labor regime and is based not only upon common labor but also upon family ties.

Evtikhiev, Land Law (in Russian 2d ed. 1929) 282–283:

There are cases where the notion of household disappears and becomes impossible, namely when we deal with co-operative land tenure.

Rosenblum, Land Law of the R.S.F.S.R. (in Russian 3d ed. 1929) 270:

In the collectives, the land and property relations in farming are built up as relations between natural persons to whom rights and duties are attached. Consequently, the rules concerning households cannot apply here.

Dembo, Agrarian Legislation of the U.S.S.R. (in Russian 1935) 91–92:

Under co-operative-collective land tenure, the household does not play any economic role. The members of a co-operative may, and often do, live in separate families, in households; but these households do not conduct their own separate independent husbandry. In brief, here the household is to be taken not in a legal sense but as a matter of mores.

Diakov, Problems of Inheritance in the Collective Farms (in Russian 1930) 21, 22:

In our opinion, the household will not be united in but absorbed by the collective farming. . . . With the introduction of collective farms, the household as a separate unit is doomed.

Pavlov, the principal editor of the textbook on the law of collective farms of 1939, wrote in 1933 that, "with the development of socialism in the country, the peasant household recedes into the past," and dealt with the household in his Program on this law, published in 1933, only in connection with independent farming (pp. 13, 93, 101).

of 1922, established when independent family farming was the mainstay of soviet agriculture, could apply under the regime of collective farming.

However, their logically justified expectations did not materialize. The traditional Russian undivided peasant household, which was recognized but not well defined by the imperial statutes, which survived the Stolypin reform and agrarian revolution of 1918–1921 and found official recognition and legal definition in the Land Code of 1922, is still alive after the collectivization of agriculture, though lacking legal definition and restricted to the house-and-garden plot. The peasant household was neither dissolved in nor absorbed by the collective farm. "The farming household under socialism," says the textbook of 1939, "has the prospect of a lengthy existence closely connected with the development of the artel as the only correct form of farming at the present stage." [21] Though unwelcome, the household was allowed to remain within the collectivized system, because it proved to be indispensable. What should become of the old-fashioned peasant household under the new conditions of collectivized farming was not and is still not clear to the soviet legislators, and no legislation has been passed to regulate the status of households incorporated in the collective farms. The Land Code of 1922 is still on the statute books; thus, in the absence of other statutory provisions, Sections 65 *et seq.* of the Code, though designed for the independent family farm of the days of the New Economic Policy according to the same textbook, still "characterize to a large extent the household in a collective farm." [22] The present soviet attitude

[21] Law of Collective Farms (in Russian 1939) 343.

[22] *Ibid.* Law of Collective Farms (in Russian 1940) 305 obviously evades

toward the farming household may be clarified by the following statements of Stalin:

> We are only on the way to the extinction of the difference between the family of a worker and that of a collective farmer, so that the latter approaches the former and not vice versa. The urban family takes care of consumption needs only, the peasant family also retains certain productive functions. This peculiarity will disappear only in the remote future when the collective farms become rich.[23]
>
> If you do not have in the artel an abundance of products and you cannot give the individual collective farmers and their families all that they need, then the collective farm cannot take upon itself the satisfaction of both collective and personal needs. In such case, it is better to acknowledge frankly that, for instance, this sphere of work shall be collective and that, personal. It is better to admit straightforwardly, openly, and honestly that a household in a collective farm should have its own personal farm plot, a small one, but its own.[24]

The soviet jurists agree that the few remaining independent farmers live totally under the household regime as provided for in the Land Code.[25] With regard to the household of a collective farmer, they introduce several reservations and leave open a number of questions (see *infra*).

3. Community Property of the Household

The "farming household" was regulated by Sections 65 *et seq.* of the Land Code of 1922 along the lines of the traditional undivided Russian peasant family, as

the answer as to the effect of the Land Code but nevertheless refers to it at several places, pp. 306, 310, 316, 322.

Polianskaia, *op. cit. supra* note 17, at 20, 64, 66, recognizes the effect of certain sections of the Land Code.

[23] Stalin, Problems of Leninism (in Russian 10th ed.) 582.

[24] Stalin's Address to the Drafting Committee on the Standard Charter 1935, quoted from Law of Collective Farms (in Russian 1939) 342.

[25] Land Law Textbook (in Russian 1940) 148 *et seq.;* Orlovsky, "Legal Status of the Household in a Collective Farm" (in Russian 1937) Problems of Soviet Law No. 2, 10.

developed by the decisions of the Supreme Court of imperial Russia and discussed *supra*.[26] For adult membership in the household, relation by blood or marriage must be combined with participation in the conduct of common farming through the contribution of labor or money. Minors and aged persons are members by virtue of their family ties and life under the same roof. Still, a household is not identical with a family, although the family forms its foundation. A household may consist of a single person without family. On the contrary, sons and daughters who carry on separate farming or are engaged in other outside trades, live apart, and do not contribute to the welfare of the "parental" household are not considered members of such household. Under the Land Code, a six-year period of such separation results in loss of membership.[27] Members who sign a contract for outside jobs with government agencies and register them with the management continue to be members for the duration of the contract. Those leaving for study, military or government service, by appointment or election, continue to be members for the entire period of their absence.[28] Strangers informally taken into the family life and joint work (quasi-adopted members, *priymaki*) are, unless working for definite wages, members of the household with the standing of relatives.[29] The membership of each household is officially recorded.[30]

[26] See Chapter 18, II, 2 (d).

[27] Land Code 1922, Sections 17, 75. See Vol. II, No. 31. Law of Collective Farms (in Russian 1939) 349. The six-year period was deduced from the provision of Section 75 that a member who stays away for over six years has no right to demand partition of the household. No particular period of time was provided for such case by the imperial statutes.

[28] Law of Collective Farms (in Russian 1940) 311.

[29] Law of Collective Farms (in Russian 1939) 345, 348.

[30] Land Code of 1922, Section 72; U.S.S.R. Laws 1935, text 517; also.

Property of the household, which consists of all articles appertaining to the common farming and life, is the common property of all members including minors, the aged, and quasi-adopted strangers. However, in contradistinction to joint property under the Civil Code (Sections 61–65), no member has a definite share in the common property. It is common property undivided into shares, and no member may in any way convey his or her interest in it.[31] Membership may be increased by marriage, birth, or admittance of strangers; it may also be decreased by death and separation. But the death of a member is not followed by descent and partition.[32] A household is not considered a legal entity; nevertheless, its common property continues to exist undivided, regardless of the change of membership. A member's share is realized only if the household is broken up completely or is partitioned by the separation of one or several members who form a new household. Even in such case, no particular rules define the share, and the whole distribution is a matter of agreement and custom.[33] During the existence of the household, a member has in fact no share in its property but merely an indefinite share in the customary use of the property; he simply enjoys such benefits and comforts as the common life of the household can offer.

Instruction for Primary Record (in Russian 1935) 14; Orlovsky, *op. cit.*, note 25. 13.

[31] *Op. cit.*, note 29, 351.

[32] *Id.* 352. The status of the household is discussed at length there. 341 *et seq.* See also *id.* (1940) 305–322; Land Law Textbook (in Russian 1940) 146 *et seq.*; Orlovsky, *op cit.*, note 25; *id.*, "Forms of Ownership in the U.S.S.R." (in Russian 1938) Soviet Justice No. 16, 11 *et seq.*; Volin, "The Peasant Household Under the *Mir* and the Collective Farm System" (1940) Foreign Agriculture 133; Mikolenko, *op. cit.* note 17 at 163 *et seq.*, does not refer to any statute except the Charter.

[33] *Id.* 352, 357, where custom is referred to; see also Land Code of 1922, Sections 55, 77, 84.

4. Separate Versus Community Property in the Household

Each member may also have his separate property, and neither is this property liable for the debts of the household, nor is the common property of the household liable for obligations incurred personally by any of its members.[34] The separate property of a member of a household comes under the provisions of the Civil Code; it may be conveyed, donated, or bequeathed, and descends according to general rules.[35] Whatever a member of a household earns in labor days forms a part of his separate property.[36] If labor days were in fact practically the exclusive source of livelihood of a collective farmer, as the framers of the Standard Charter expected, the lack of clarity in the status of the household would be unimportant.[37] But, as will be shown *infra*, the soviet laws contain statements to the effect that family farming plays an important role in the life of a collective farmer and occasionally overbalances his interest in collective farming.

Thus, several legal questions regarding the status of the household have been raised by soviet jurists but for the most part remain unanswered by legislation and the courts. The first is whether the investment of labor day earnings in the common farming of the household

[34] *Id.* 352; Land Code of 1922, Section 71.

An exception to this rule existed under Section 56[1] of the Code of Laws on Marriage, Family, Etc. as in force from January 25, 1930, to April 16, 1945:

Whenever the court declares a member of a peasant household to be the father of the child, it shall simultaneously fix the amount of produce which his household must give for the maintenance of the child.

[35] *Ibid.*, also 353.

[36] R.S.F.S.R. Supreme Court, Presidium, Resolution of March 3, 1932. Protocol No. 7, Civil Code (1943) 226.

[37] Orlovsky, *op. cit.*, note 25 at 12, 13; Law of Collective Farms (in Russion 1939) 346.

affects the share of the investing member in the common property of the household. Can such member in the event of withdrawal from the household, for instance, if he goes away permanently for another job, claim compensation for such investment? Are the members obliged to contribute their earnings in labor days for the necessary upkeep of the common dwelling, et cetera?[38] The absence of an answer may be explained perhaps by the fact that, being a traditional institution, the household continues to exist under the unwritten law of custom. Internal relations within the household were not regulated by the imperial statutes. So, under the soviet law, they continue to conform to the morals and mores of the family itself.

However, an especially controversial point arises under the soviet law. Historically, the concept of the household developed from the authority of the head of the family, the house-elder. To be under the authority of a paterfamilias meant to belong to his household. Under the imperial law, the authority of the head of the household, man or woman, was openly recognized. He alone had a voice in the village assembly. In a collective farm, every member over sixteen years of age has his own voice in all collective affairs. Does he have a voice in the affairs of household farming? The soviet jurists insist upon the equality of rights of all the members of the household.[39] However, this principle is

[38] Law of Collective Farms (in Russian 1939) 165, 166; Steinberg, "Legal Relations of Members of a Farming Household" (in Russian 1938) Soviet Justice No. 20/21, 34, 35.

[39] Law of Collective Farms (in Russian 1939) 345, 353, 354; *id.* (1940) 307, 308, 314; Basic Principles of Land Tenure of 1928, U.S.S.R. Laws 1928, text 642, Section 11 referred to prohibits only "any discrimination depending upon sex, nationality, religion, and citizenship" and does not touch the internal relations of the household. Orlovsky, *op. cit.*, note 25, 13, 14.

nowhere expressed in the soviet statutes. Under Section 68 of the Land Code, the head of the household is "recognized as the representative of the household in farming matters." He is also the representative before the public authorities in the matter of public levies upon the household. Assessments of taxes in kind are served upon him.[40] Thus, he is the unquestionable manager of the family estate. There is only one rule directly protecting the interests of the members which was known also to the imperial customary law.[41] In case the mismanagement of the house-elder threatens to impoverish the household, the members of the household may obtain from the public authorities an order deposing him and appointing another member of the household in his place.[42] But that is all. The powers of the head of the household remain otherwise undefined and unrestricted.

Certain questions involving membership in the household and membership in the collective farm were definitely decided. Several laws were enacted to allow special advantages to collective farmers who would go to work in government-owned industries where there was a shortage of manpower, e.g., the mining and peat industries.[43] Judging from the complaints in the preambles to laws in 1935 and 1938,[44] the collective farms expelled members so engaged and deprived them of house-and-garden plots. This practice has been barred. The law

[40] U.S.S.R. Laws 1938, text 3; Law of Collective Farms (in Russian 1940) 315.

[41] Leont év, Peasant Law (In Russian 1909) 336 *et seq.*

[42] R.S.F.S.R. Land Code, Section 69.

[43] U.S.S.R. Laws 1933, text 116; *id.* 1935, text 520; *id.* 1936, text 95; *id.* 1937, text 46; *id.* 1938, texts 15, 208, 298; *id.* 1939, texts 221, 397. Law of Collective Farms (in Russian 1939) 290. Regarding those who left without registering contracts with the collective farms, see U.S.S.R. Laws 1934, text 389.

[44] U.S.S.R. Laws 1935, text 520; *id.* 1938, text 115.

of 1938 ruled that, if a collective farmer works in government industries under a contract duly registered with the management of the collective farm, and the members of his household continue to work on the collective farm, such farmer retains his membership in the collective farm and his household retains the house-and-garden plot.[45] Thus, only such farmers are protected as work outside the collective farm in government industry in execution of the government plan and have been employed in a procedure established by the government.

There are, however, instances in which the law directly provides for withdrawal of the house-and-garden plot from the tenure of the household. Since 1939, each collective farmer, man or woman, has been obliged to earn a minimum credit of labor days to retain membership in the collective farm. Those who fail to do so are expelled and deprived of house-and-garden plot.[46] Again, although the buildings on the house-and-garden plot, as well as any crops thereon including orchards, are in the absolute ownership of the household and as such may be sold and otherwise conveyed, the land of the house-and-garden plot may not be disposed of by the household to which it is allocated.[47] The household may only use it, i.e., exploit it agriculturally by the labor of its members. No plot may be rented out or transferred to the use of another free of charge, even temporarily. The law provides in general terms that members of collective farms who allow such transfer shall be deprived

[45] U.S.S.R. Laws 1938, text 115, Section 2; *id.* 1939, text 235, Section 16; Orlovsky, *op. cit.*, note 25, 13.

[46] U.S.S.R. Laws 1939, text 235, Sections 8 *c*, 14. Under the U.S.S.R. Laws 1942, text 61, children beginning with the age of twelve years must also obtain a minimum credit, but the law does not make explicit whether their failure to do so affects the status of their parents.

[47] *Id.*, Section 4; Land Law Textbook (in Russian 1940) 144.

of their house-and-garden plots.[48] Because a household usually includes several adult members, in either instance it may happen that only one of them is guilty of the afore-mentioned contravention. The statutory provisions do not make clear whether such acts of individual members are sufficient grounds for deprivation of the entire household of its house-and-garden plot, and whether such act committed by the head of the household necessarily entails this consequence, thus affecting the interests of the innocent members. Finally, the withdrawal of plots from "sham collectivist farmers," i.e., farmers who have actually left the farm but continue to draw benefits from their house-and-garden plots, is expressly provided for by statute.[49] However, in such instances, it is recommended that the buildings erected on the plot which are in their absolute personal ownership be bought from them.[50] Expulsion of a member from a collective farm, except in these specified instances, should not, in the opinion of soviet jurists, affect his membership in his household or the use of the plot by the household.[51] If a member is absent for military service, as a student, or to hold an elective office, as well as in case of illness, his membership in the household is not affected, regardless of the duration of his absence. Otherwise, an absence of six years severs his ties with the household.[52]

5. Limitations on Household Farming

A general limitation on the private farming of the

[48] *Id.*, Section 5.
[49] *Id.*, Section 8, subsection (a).
[50] U.S.S.R. Laws 1939, text 362, Section 7.
[51] R.S.F.S.R. Land Code 1922, Sections 17, 75; Law of Collective Farms (in Russian 1939) 164, 349; Orlovsky, *op. cit.*, note 25, 13; see also note 27.
[52] Law of Collective Farms (1939) 349.

household is stated in Section 7 of the 1936 Constitution. Farming on the house-and-garden plot is there defined as "auxiliary." This means that private farming must remain subsidiary and secondary to collective farming. The soviet jurists insist that in contradistinction to an independent household, a household in a collective farm "is a special form of organization of the subsidiary farming of the collective farmers." They emphasize that the household in a collective farm does its farming "on the basis of the collective large-scale production" of the entire collective farm.[53] It has no field acreage, no major implements, no large livestock, and it may not acquire these. The individual farm must dispose of the natural growth of its livestock in order not to exceed the limits permitted. A calf when it becomes a cow must be sold to the collective farm or on the open market.[54] Household farming must remain small. Although it is not confined to production for consumption needs and may produce for the market, it is deprived of the possibility of breeding capitalism.[55] In many ways, the household is dependent upon the collective farming for its own functioning. A household has to resort to the collective resources to obtain a horse or other draught animal and for forage.[56] Certain advantages are obtained by individual households if the col-

[53] *Id.* 342 *et seq.;* Orlovsky, *op. cit.*, note 25, 12, 13; Land Law Textbook (in Russian 1940) 139; Law of Collective Farms (in Russian 1940) 308, 309.

[54] Should the livestock in the possession of a household increase in excess of that provided for in the Charter, the household is obligated to dispose of the surplus, keeping in its auxiliary farming no more livestock than is allowed by the Charter. Law of Collective Farms (in Russian 1939) 261.

[55] Orlovsky, "Forms of Ownership in the U.S.S.R." (in Russian 1938) Soviet Justice No. 16, 11.

[56] Law of Collective Farms (in Russian 1939) 346; *id.* (1940) 229; re fodder see U.S.S.R. Laws 1935, text 67; re horses see Orders of the Commissar for Agriculture of May 8 and 25, 1935 (in Russian 1935) Collection of Orders of the People's Commissar for Agriculture No. 35, 22.

lective farm as a whole shows efficiency, in particular in animal breeding. Thus, a certain percentage of meat and dairy products delivered by the collective farm are credited towards levies of the same products on individual households.[57]

In brief, the soviet laws and regulations seek to strengthen the ties between the collective work of the artel and the individual farming of the household. However, on the eve of World War II, the aim of the government to make private farming a subsidiary source and collective farming the main source of subsistance of a collective farmer had not been achieved. Private farming within the collective farms had shown an undesirable growth. Andreev, the Secretary of the Central Committee of the Communist Party, observed in the spring of 1939:

> In some places, private household farming has begun to outgrow the collective farming and become the basic agriculture, while collective farming, on the contrary, has become secondary. . . . The income from personal farming, from vegetable gardens, orchards, milk, meat, etc., in some collective farms has begun to exceed the earnings based on labor days. This could not but have an adverse effect on working discipline in the collective farms. The right combination of personal and collective interests in the collective farms remains the basis of the collectivization movement, but individual farming must acquire a narrower subsidiary character, and collective farming must be increasingly basic.[58]

The Law of May 27, 1939, of which a full translation is appended,[59] complains that "there are a large number of pretended collective farmers who either do not work at all or do only sham work and spend most of their time

[57] *Id.* 356; U.S.S.R. Laws 1937, text 342.

[58] Andreev, Speech at the XVIII Congress of the Communist Party (in Russian 1939) 33, quoted from Land Law Textbook (in Russian 1940) 138.

[59] U.S.S.R. Laws 1939, text 235; see Vol. II, No. 33.

on their own personal farming. . . . The local leaders of the Party and the government agencies have . . . often encouraged the avaricious elements among collective farmers." The law describes in its preamble how the peasants used all legal and occasionally illegal methods to maintain the size of the individually held plots and to farm on a scale in excess of the limits established by the Charter of 1935. The preamble indicates that partitions of households, real and pretended, were made with the sole purpose of obtaining an extra house-and-garden plot. The plots were often used for field crops and not for vegetable gardens and orchards. Amidst the collective fields, islands of enclosed farms reminiscent of the independent homesteads (*hutor*) sponsored by the Stolypin reform of 1906 were disclosed. In all probability, they simply survived collectivization. In many instances, the actual size of the individually held plots exceeded the maximum provided for in the Standard Charter. Collective farmers traded and rented their house-and-garden plots as if these were in their private ownership. Hay land in the collectively held acreage was often distributed to members and non-members for private mowing. Collective farmers who had actually left the farm continued to draw benefits from house-and-garden plots assigned to them, using third parties for this purpose. According to the preamble, the leaders of the collective farms and local communist and administrative officers tolerated all these contraventions of the principles of the Standard Charter of an Agricultural Artel.

The law outlined a wide program of measures designed to bring private farming within the permitted

limits,[60] introduced certain new limitations,[61] and laid the foundation of the sponsorship of emigration to Asiatic Russia and the Volga region.[62]

A minimum credit of from 60 to 100 labor days annually, depending upon the region, was established as a prerequisite to membership in a collective farm.[63] A survey of the individually held plots was ordered to be taken by August 1, 1939, and permanent inspector-surveyors were to be appointed to check up periodically on the size of privately held plots.[64] Boundary lines between the collectively held fields and the house-and-garden plots were to be drawn and marked, and a permanent record of holdings in both categories was to be kept by the district land office.[65] All surpluses in excess of the established standards and all plots not adjacent to house lots but situated between collective fields were to be withdrawn from the holder and turned over to the collective farms.[66] They were either to be fused with the collectively cultivated fields or to form a reserve for supplying new members with plots or increasing undersized plots. The law ordered the liquidation of all individually held plots which were in the nature of enclosures, farmsteads within collective fields, and the segregation of the residences of the holders of such plots into new villages before September 1, 1940.[67] The pro-

[60] *Id.*, Sections 1–3, 4, 7 (a).

[61] *Id.*, Sections 5, 7, 8, 10, 11, 12, 13, 14.

[62] *Id.*, Section 15. In 1939, 10,000 families emigrated and, in 1940, some 35,000 families were assigned for emigration. Kazantsev, "Survey of Legislation on Collective Farms" (in Russian 1940) Soviet State No. 7, 136. See also, U.S.S.R. Laws 1939, texts 348, 444; *id.* 1940, text 2.

[63] *Id.*, Section 14.

[64] *Id.*, Sections 9, 13.

[65] *Id.*, Sections 10, 11, 12.

[66] *Id.*, Section 7, subsections (a) and (b).

[67] *Id.*, Section 7, subsection (c).

hibition on renting or unauthorized transfer of house-and-garden plots was restated under penalty of expulsion from the collective farm and deprivation of house-and-garden plot.[68] The same consequence was attached to failure to attain the required minimum of labor days and pretended partition of a family household for the purpose of obtaining an additional plot.[69] Chairmen and officers of collective farms were held responsible in the event of failure to enforce the rules of the Standard Charter restricting the expansion of private farming.[70]

The survey disclosed a total of nearly five million acres (two million hectares) of surplus area in all the plots in the Soviet Union, and by 1940, 4.4 million acres of such surpluses had been withdrawn.[71] During the second half of 1939, 450,000 households were removed from their enclosures to form villages, and over 100,000 households were scheduled to be moved by September 1, 1940. In the Byelorussian Republic, 110,000 were thus removed, in the Ukraine, 95,000, and in the Smolensk province of the R.S.F.S.R., 98,000.[72]

Thus, on the eve of World War II, the soviet laws were turned against the expansion of private farming within the collective farms. No change in this respect is shown by the laws enacted during the war. The principle of a mandatory minimum of labor days was retained, and in 1942 the required number was raised to 150, 120, and 100 for the duration of the war.[73] Those

[68] *Id.*, Section 5.

[69] *Id.*, Section 8, pars. 3 and 14.

[70] *Id.*, Sections 4, 6.

[71] (1940) Socialist Agriculture, quoted from Kazantsev, *op. cit.* note 62.

[72] *Ibid.;* also Pravda, January 12, May 20, June 10, 1940, quoted from Land Law Textbook (in Russian 1940) 232.

[73] U.S.S.R. Laws 1942, text 61. For translation, see Vol. II, No. 34. Polianskaia, Land Law (in Russian 1947) 63, refers to this act as still effective.

who fail to attain the minimum are also liable to compulsory labor without confinement for a period not to exceed six months with payment of 25 per cent of their earnings to the collective farm. The same law also requires from juvenile collective farmers of from twelve to sixteen years of age a minimum credit of fifty labor days annually.

From the foregoing, it follows that very narrow limits are allowed by the soviet laws to private family farming within collective farms. Statutory provisions are flexible, uncertain, and easily expanded one way or the other. With the slightest shift in the government policy, the acts of local administrators easily appear as transgressions in one way or another. This explains the fact that "purges" have been repeated with the permanency of cycles. In spite of all the difficulties and risks, it seems that individual farming continues to strive for expansion by all means. At least, a new campaign for its suppression was announced by a joint Resolution of the Council of Ministers and the Central Committee of the Communist Party of September 19, 1946. This act is a lengthy restatement of the Act of May 27, 1939. It repeats that:

> The house-and-garden plots are enlarged by means of unauthorized seizures or illegal additions by the management and chairmen of the collective farms, done to boost the personal farming to the detriment of the collective.

As in 1939, the law complains that such occurrences "acquired again a mass character," and were tolerated by the local officials, and ordered a new check up and surveying of house-and-garden plots. As was mentioned elsewhere, over 525,000 hectares (1,250,000

acres) were withdrawn from such plots by January 1, 1947.[74]

However, if private farming succeeds in keeping itself within these limits, it is protected against foreclosure for debts and taxes payable in money. Property vital to the existence of the household may not be attached.[75] Here the soviet laws followed similar provisions of the imperial laws.

6. Conclusion

The abolition of private ownership of land in Russia, a country of vast territory and importance in agriculture, raised the problem whether private ownership of land is an indispensable warranty of economic progress and liberty or an outworn relic of the past. It is true that for many centuries absolute private ownership of land was not the form of tenure under which land was held by the majority of farmers in Europe. However,

[74] For a full translation of the act, see Vol. II, No. 35. "The reports of the surveyors and other data show that unauthorized taking possession of collective land by individuals did not cease." Mikolenko, *op. cit.* note 17 at 85.

[75] Law of Collective Farms (in Russian 1939) 357. According to the Resolution of the R.S.F.S.R. Council of People's Commissars of March 28, 1945, No. 196 (Guide to the People's Judge (in Russian 1946) 540), the following property of a household is exempt from execution for debts and taxes:

(a) The dwelling house with buildings appertaining to farming;

(b) One cow, or in the absence of a cow, one calf; half the fowl, sheep, goats, etc. up to one-half the number of heads permitted under the Charter, and forage for them, according to a schedule;

(c) Clothes, footwear, laundry, bed linens, kitchen utensils, beds, chairs and tables, chests, lamps serving for the personal use of the debtor and his family, according to a schedule, and all children's apparel;

(d) Food needed for the debtor and his family until next harvest, according to certain rations per month;

(e) Aid received under social security and aid given to mothers of many children;

(f) Instruments needed for home industries of the debtor.

There were similar provisions under the imperial law, *cf.* the Code of Civil Procedure 1864, Sections 935, Note 1, and 973, especially subsection 10 (as amended in 1873).

in the past, land tenure without ownership has been followed by the poverty and bondage of the farming class to the landlord or government. The farmers' freedom and prosperity have seemed to be corollaries of private ownership of the land they till. The study of peasant land tenure under the soviet regime reveals an undying effort of the Russian farmer to obtain as much resemblance to private ownership of land as he can. It shows also that the regime of collective farms implies substantial menace to the liberty of the collective farmer. For its enforcement and protection the regime needs severe penalties lavishly imposed. It is for economic studies to inquire whether at this price a better living is being bought.

Chapter 22

Labor Law

I. Survey of Sources

The soviet Civil Code reserved the regulation of labor relations to a special code. However, the R.S.F.S.R. Labor Code, enacted in 1922 [1] and adopted in all other soviet republics, reflects present soviet labor law to a very limited extent. This Code was drafted at a time when private enterprises were to some extent tolerated and the government was not the sole employer. Numerous laws and decrees of a general nature, or dealing with specific branches of industry or specific categories of employees, have been enacted since the inauguration of the socialist system of economy, and only a few of them have been incorporated in the Labor Code. Moreover, many enactments promulgated during the war under the pressure of war emergencies seem to remain in effect and have apparently become permanent elements of the soviet Labor Law. Finally, numerous decrees of the Council of Ministers were not printed in the official law gazettes, and only their abstracts by soviet jurists are available. Until recently the soviet jurists did not even attempt to systematize the scattered material. No annotated edition of the Labor Code has appeared in the Soviet Union for several years; since 1938 only various

[1] R.S.F.S.R. Laws 1922, text 903, effective from November 15, 1922. The latest English translation, as in force on May 1, 1936, was published by the International Labor Office in the 1936 Legislative Series, Russ. 1. For an analysis of more recent acts in English, see Paul Haensel, "A Survey of Soviet Labor Legislation" (1942) 36 Ill. L. Rev. No. 5, 529.

compilations of laws and decrees affecting labor, without the text of the Code, have been printed.[2] The recent soviet textbooks on labor law (1944, 1946) expressly warn students that the soviet labor codes do not reflect the existing soviet law. According to the textbooks:

> Many necessary modifications flowing from federal acts establishing new rules and issued in the last years (beginning with the federal Act of December 28, 1938) have not been incorporated in the labor codes of the soviet republics. Therefore, in applying the labor codes, one must keep in mind the existence of effective federal acts and be directed by these and not by the outdated language of individual sections of the Code.[3]

Only late in 1947 has a compilation appeared in the Soviet Union, which attempts to group the scattered provisions according to the system of the R.S.F.S.R. Labor Code and combine them with the provisions of the Code.[4] But in doing so the compilers have had to omit some thirty sections of the Code, out of 182, as obviously inoperative, although not yet repealed. The sections omitted affect almost without exception the basic principles of labor law and express the liberal spirit of the New Economic Policy, guaranteeing to some extent freedom of contract and the rights of labor.[5] The

[2] E.g., Labor Legislation (in Russian 1941), a comprehensive compilation. Labor Legislation: Reference Book (in Russian 1944) contains some acts issued since 1940; Work and Pay of Clerical Employees (in Russian 1946). Some compilations cover only a separate branch of industry, e.g., the textile industry (1946).

[3] Aleksandrov and Moskalenko, Soviet Labor Law (in Russian 1944) 22; Aleksandrov and Genkin, Soviet Labor Law (in Russian 1946) 49. For the act referred to in the passage, see *infra* at note 85.

[4] Aleksandrov, Astrakhan, Karinsky and Moskalenko, compilers, Goliakov, editor, Legislation Concerning Labor, a Commentary to the Labor Legislation of the U.S.S.R. and the R.S.F.S.R. Labor Code (in Russian 1947), hereinafter cited as Labor Legislation (1947).

[5] Among the omitted sections are the following: 56, defining the method of fixing the standard of output, which controls the wages; 58, referring the determination of wages to the employment contract or collective agreement; 94, 95, 97 [1], fixing work hours; 111–113, dealing with rest days.

uncertainty of the situation is well illustrated by the fact that the compilers originally omitted the whole chapter on collective agreements and at the last moment inserted it as an appendix, in view of a sudden, recent change in soviet policy in this respect (see *infra*).[6] In fact, the compilers could have omitted many more sections of the Code, because their text is in many instances followed by recent acts which make these sections virtually obsolete. In view of such a state of the source material, the present chapter is confined to the major topics of labor law. Making no claim to be exhaustive, it offers an outline primarily of the recent laws and decrees showing the current trends in soviet labor law. Translations of some of these laws are to be found in Volume II, Nos. 40 to 43.

The soviet compilation of 1947 mentioned above became available just in time to verify that the information given in the present chapter is up-to-date.

Social insurance (workmen's compensation) is not touched upon at all, as this study is confined to the soviet private law. Likewise, no attempt is made to outline the condition of forced labor employed under the jurisdiction of the Ministry of the Interior. The available legal material is insufficient for this purpose. Labor law is dealt with in this study as it applies to the soviet equivalent of free labor.

II. General Trends in Soviet Labor Law

1. Collective Bargaining

During the period of Militant Communism, when private enterprise was suppressed, an attempt was made

Other sections omitted: 5–10, 40, 46, 47 [1], 48, 53, 54, 86, 109, 137, 162–164, 169 [1], 171, 172.

[6] Sections 16–26, *op. cit.*, note 4 at 325.

to regulate labor relations on the basis of labor duty, that is to say, conscript labor, a principle which was declared in the Labor Code of 1918.[7] The New Economic Policy allowed private enterprise within certain limits,[8] and the Labor Code, enacted in 1922, sought to regulate labor relations on the principle of free contract and to protect labor by methods resembling capitalist liberal legislation, such as giving force to collective bargaining. However, these provisions were gradually either repealed or became in fact inoperative, according to the soviet writers,[9] after socialization of the economy was resumed in 1929 with the inauguration of the First Five-Year Plan. As a recent soviet textbook on labor law explains, "The socialist industrialization of the country required that labor law . . . serve the successful struggle for productivity of labor and strengthening of labor discipline."[10] And in fact, the legislation enacted since socialism has been declared achieved in the Soviet Union has tightened labor discipline and increased the powers of management at the expense of the rights of labor.

When private enterprise disappeared, the government became the principal employer in industry and commerce. All persons engaged in industrial production, from top executives down to manual laborers, are the employees of a single owner—the State. In that sense there is no contrast between capital and labor in the Soviet Union. But, as is mentioned elsewhere, each governmental enterprise is a separate unit,[11] with an established management enjoying some independence,

[7] R.S.F.S.R. Laws 1917–1918, text 905, Sections 1, 2, 3.
[8] See Chapter 1, III.
[9] See *infra* at note 19.
[10] Aleksandrov and Genkin, Soviet Labor Law (in Russian 1946) 90.
[11] See Chapter 11.

particularly in employment, dismissal, allocation of wages, imposition of penalties and granting of rewards to the personnel of the enterprise. Therefore, instead of the contrast between labor and capital, we have in the soviet setting the contrast between labor and management. This is clearly seen in the provisions of the Labor Code designed to regulate labor relations in general and to apply equally to private and governmental employment. In dealing with relationships treated in Anglo-American law under the topic master and servant, the soviet Code visualizes the labor contract (employment contract) as determining the rights and duties of the "employer" and the "employee." [12] In other instances the Code refers to management and workers.[13]

Even at the time of the enactment of the Code, both management of governmental enterprises and the only legal representation of the workers—the trade-unions—were equally controlled by the soviet government and the Communist Party.[14] Nevertheless, the Labor Code relegated the determination of basic labor conditions to the collective agreements between these two elements: management on the one side and labor as represented by the trade-unions on the other.[15] Thus, the possibility of differences in opinion was recognized, and negotiation and arbitration were devised as a means of settling disputes. Only a few rules of the Code were strictly mandatory, and some room was left for freedom of agreement (e.g., standard of output, rates of wages, shop

[12] Labor Code 1922, Sections 27–34. The following translations of Russian terms are used in this study: *nanimatel*—employer; *nanimaiushiysia*—employee; *rabochiy*—wage earning employee, laborer; *slujashiy*—salaried employee, clerical employee. When both categories are mentioned, *rabochie i slujashie*, one word "employee" is used in English to cover both.

[13] *Id.*, Sections 158, 159 *et seq.*

[14] See Chapter 11, p. 407.

[15] Labor Code 1922, Sections 15, 56, 58. See *supra*, note 5.

rules, et cetera). It may also be noted that whenever there was a difference in rules applicable to private business or to government enterprises, the former were more beneficial to labor. For example, private business had to pay full wages in case of stoppage or spoilage through no fault of the employee, while the governmental enterprise paid and pays only part, if anything at all. If an employee in a private enterprise failed to attain the required standard of output, he was to be paid not less than two thirds of his scheduled rate. In a similar case an employee of a governmental enterprise was not paid at all (Labor Code, Section 57).[16] All these rules may still apply in the Baltic soviet republics, where small-scale private enterprises are not completely suppressed.

The elements of contractual freedom have shown a tendency to disappear. Again, the task of the trade-unions as an instrument of government and Party policy overshadowed the protection of the interests of labor. As the textbook of 1946 puts it: "In participating in the settlement of labor disputes, the trade-unions proceed from the idea of unity of the interests of the toilers of our country and those of our socialist State."[17] At the Sixteenth Congress of the Communist Party, in January, 1930, when private enterprise was almost done away with, the trade-unions were directed to strive in collective bargaining not only for improvement of the standard of living of the workers but also to take into account the business standing of the enterprise with which the bargain was made and the interests of the whole of the national economy. In making the agreement, the resolution insisted, each party must undertake definite obligations concerning the carrying out of the

[16] See *infra* III.
[17] *Op. cit. supra,* note 10 at 312.

financial and production plan of the enterprise. In particular, the trade-unions were obligated to guarantee on behalf of the workers, the productivity of labor contemplated by the plan.[18] The further history of collective bargaining under soviet law is related by the textbook on soviet labor law of 1946 as follows:

> The Sixth Plenary Session of the Council of Trade-Unions in 1937 contemplated renewing the practice of making collective agreements. The last collective bargaining campaign was conducted in 1933. The effect of agreements made in 1933 was extended to 1934. From that time on, no collective agreement has been made (except in the case of shipping by water, commercial organizations, and the timber industry, for which such agreements were last made in 1935).
>
> However, life has shown that restoration of the practice of collective bargaining is not expedient. *Collective agreement as a special form of legal regulation of labor relations of manual and clerical employees has outlived itself.* Detailed regulation of all sides of these relations by mandatory acts of governmental power does not leave any room for any contractual agreement concerning one labor condition or another.[19]

In plain English, this means that the soviet leaders have chosen to abandon the last vestige of contract in relations between labor and management for the sake of outright government regimentation. Capitalist collective bargaining does not fit socialist surroundings in the Soviet Union.

However, since March, 1947, a new development has taken place. With the approval of the Council of Ministers, the Presidium of the Central Council of the Trade-Unions announced the necessity of a wide campaign for making collective agreements in industry, shipping, and building construction.[20] The collective agreements were

[18] *Id.* 98.

[19] *Id.* 106, italics in the original.

[20] Resolution of the Presidium of the Central Council of Trade-Unions

ordered concluded during March and April, 1947. This time the collective agreements have been declared to be the most important measure "to achieve and exceed the production plan, to secure further growth of the productivity of labor, improvement of the organization of labor, and the increase of responsibility of management and trade organizations for the material condition of living of the employees and cultural services rendered to them." [21] Nevertheless, the new policy is far from introducing free bargaining. Certain matters are distinctly excluded from any negotiation and agreement and are reserved for government regulation.

It is the positive requirement of the new rules that "the rates of wages, of piecework, progressive piecework, and bonuses as approved by the government must be indicated" in the agreement. It is positively forbidden to include in the collective agreement any rates not approved by the government.[22] In other words, rates of wages are excluded from bargaining and as included in a collective agreement are no more than applications of the governmental schedule to the establishment for which the collective agreement is drawn. This is true, to a large measure, of other points to be covered by collective agreements, in particular, the standards of output. The official acts and the jurisprudential writings insist that the primary purpose of such agreements is to translate the abstract terms of the general plan for economic development into specific assignments and obligations within each particular establishment.[23] They appear

Concerning Entering into Collective Agreements for the Year 1947, Trud (in Russian) March 16, 1947; Labor Legislation (1947) 15.

[21] *Id.*, Preamble; Trud, April 18, 1947.

[22] *Id.*, Section 6.

[23] Resolution of the XVIth Plenary Session of the Central Council of Trade-Unions, April 1947, (1947) Trade-Unions (in Russian) No. 5, 5

merely a form in which the orders of the government are made more precise. As before, the new regulations are based on the assumption that "the interests of the workers are the same as the interests of production in a socialist state" and the collective agreements are designed to be the "juridical form of expression of this unity." [24] In accordance with the newly devised procedure, a model agreement is drafted by each ministry upon consultation with the central office of trade-unions concerned. Then the model agreement is sent with a directive letter to the various establishments where it must be used as a means of raising the enthusiasm of workers for the execution of the assignment based not upon free agreement but upon an order from above.[25] Collective agreements drawn by such procedures are not the result of collective bargaining and are not based upon a free contract. It may be observed, however, that whenever the soviet government faces the task of restoration of its economy, it prefers to give to the decreed labor conditions, at least, the appearance of an agreement. But absence of free enterprise and free labor unions reduces the agreement to a mere formality.

et seq.; Sidorenko, "The Collective Agreement Is the Basis of Work of the Trade-Union in an Establishment," *id.* 16 *et seq.;* Moskalenko, "Legal Problems Involved in Collective Agreements," *id.* No. 8, 16 *et seq.;* Trud, April 18, 1947. *Cf.* the statement in Labor Legislation (1947) 15:

It is understood that the present day collective agreements could not but be different by content from collective agreements which were made at the time when the rates of wages and some other conditions of labor were not established by the law and government decrees.

The purpose of the present day collective agreements is to make concrete the duties of the management, shop committees, workers, technical, engineering, and clerical personnel toward the fulfillment of the production plans and production over and above the plan as well as to raise the responsibility of business agencies and trade-unions for improvement of material living conditions of workers and cultural services rendered to them.

[24] Moskalenko, *op. cit.* 17; Editorial Trud, April 18, 1947.

[25] *Lex cit. supra,* note 20, Sections 2–4; Labor Legislation (1947) 326.

2. Employment by an Administrative Act

It may be noted that the application of free agreement in individual employment is also curtailed considerably. As is mentioned elsewhere,[26] once on the job an employee may not quit it without special authorization from the management, and certain categories of employees may be transferred, even against their will.[27] Moreover, at present the soviet jurists point out that in many instances under the soviet labor law, employment comes into being, as they put it, not by virtue of a contract between the employee and the management of an establishment, but by an administrative act,[28] that is, an order of public authorities equally binding on both.

Thus, graduates from higher educational institutions (universities) and vocational schools on the level of junior colleges (*tekhnikum*), upon graduation, are assigned to jobs by the ministry in charge of the particular school and must work at the assigned place three[29] or five years.[30] Failure to take the appointment is treated as an offense punishable in court as absenteeism or unauthorized quitting of the job.[31] Likewise, a youth drafted for training in industrial work or railroad service must take the appointment upon completion of training and work at the assigned place for four years.[32] Finally, several laws were enacted during the war pro-

[26] See *infra* 3 at note 40 and IX.

[27] See *infra* IX.

[28] *Op. cit. supra*, note 10 at 137.

[29] *Id.* 139, also Resolution of June 23, 1936, Higher Education (in Russian 1945) 170; Labor Legislation (1947) 11, 12.

[30] *Id.;* also Act of September 15, 1933, U.S.S.R. Laws 1933, text 356.

[31] Orders of the U.S.S.R. Commissar for Justice and the U.S.S.R. Attorney General of September 25, No. 125/171, and December 4, 1939, No. 173/207, Labor Legislation of the U.S.S.R. (in Russian 1941) 236; *id.* (1947) 12.

[32] See *infra* X.

viding for the draft of labor.[33] Soviet writings which appeared after the war do not treat these laws as transitory emergency measures but include them in the system of soviet labor law.[34] Consequently, there is an element of conscript labor in present soviet labor law, even apart from convict labor.

3. Increase of Powers of Management

The constant increase of the power of management is revealed by the successive stages of amendments to some individual provisions of the Labor Code. Provisions defining the right of the employer to dismiss the employee summarily because of failure to appear for work may serve as an illustration. The Labor Code of 1922 incorporated the provision of the imperial law,[35] that the management is entitled to dismiss a worker in case of failure to appear without justifiable reason for three consecutive days or for six days during a month.[36]

[33] See *infra* XI.

[34] *Op. cit.*, note 10 at 142 *et seq.*, 435 *et seq.;* Labor Legislation (1947) 11, 12.

[35] Code of Industrial Labor, Section 62, subsection (1) (1913 ed.) Svod Zakonov, Vol. XI, Part 2.

[36] Labor Code, Section 47, original subsection (f).

Other reasons for premature dismissal are:

(a) Entire or partial winding up of the enterprise and reduction of work therein;

(b) Total stoppage of work for more than one month;

(c) Unfitness of the employee for the work, in certain instances loss of confidence in him by the administration;

(d) Persistent failure of the employee to fulfill, without a justifiable reason, his duties under the employment contract or shop rules;

(e) Conviction for a crime in court for an act connected with the employee's work or for imprisonment for more than two months (in the case of a seasonal worker two weeks, of a temporary worker one week);

(f) Absence of the employee for more than two months because of the temporary loss of the ability to work (in the case of a pregnant woman the two months are reckoned in excess of pregnancy leave);

(g) If the employee who previously occupied the post is reinstated by

In 1927 this was changed. Failure to appear for a total of three days during a month, not necessarily in succession, constituted grounds for dismissal.[37] Then, in 1932, it was enacted that failure to appear without justifiable reason for one day only was sufficient ground for dismissal of a worker in a government enterprise and must be followed by eviction by administrative procedure from the living quarters which he occupied because of his employment.[38] By the Act of December 28, 1938, as authentically interpreted on January 9, 1939, a single instance of tardiness exceeding twenty minutes or repeated minor cases of tardiness were declared a mandatory reason for dismissal from a government enterprise.[39] Later, by the Edict of June 26, 1940, freezing on the job was enacted, and unauthorized quitting of a job was declared an offense punishable by imprisonment.[40] Then, according to the soviet jurists, the possibility arose that workers might abuse the above provision, fail to appear on time intentionally in order to be dismissed and thereby obtain a chance to find a better job.[41] Therefore, the same Edict of June 26, 1940, also rescinded mandatory dismissals for tardiness and absenteeism and declared

the court of the piece-rate and dispute board. Labor Code, Section 47 (as amended); Resolution of the People's Commissar for Labor of November 6, 1930; U.S.S.R. Laws 1926, text 290; *id.* 1927, text 80; Aleksandrov, *op. cit.*, note 10 at 298 *et seq.*; Labor Legislation (1947) 39;

(h) In certain instances of refusal by an employee to be transferred to another job, Labor Code, Sections 36, 37.

[37] Labor Code, Section 47, as amended by the Act of August 22, 1927, R.S.F.S.R. Laws 1927, text 577.

[38] Act of November 20, 1932, R.S.F.S.R. Laws, text 371, by which subsection (f) of Section 47 of the Labor Code was repealed and a new Section 47 [1] added.

[39] See *infra* IV, Act of January 18, 1941, Section 26, also IX.

[40] Edict of June 26, 1940, Vedomosti 1940, Nos. 20 and 28.

[41] Aleksandrov, *op. cit.*, note 10 at 297. See also *supra*, p. 203.

them to be offenses punishable by disciplinary penalty in case of tardiness or punishable in court for absenteeism.

4. Arbitration and Conciliation

With the elimination of collective bargaining, the procedure originally devised for settling labor disputes has also undergone a change. At present the soviet jurists draw a distinction between disputes involving establishment or change of labor conditions and those arising from the application of conditions already established. For all practical purposes, they say, only the second group comes under the special arbitral procedure originally devised for both.[42] Establishment of labor conditions and their change are at present within the province of the administration. Conciliation boards and arbitral boards, established for this purpose under the Labor Code and Act of August 29, 1928[43] (which remain on the statute book), went out of existence after the People's Commissariat for Labor was fused with the Central Council of Trade-Unions in 1933.[44] The piece-rate and dispute boards established at that time in each establishment (factory, plant, and even large shop) are still in existence, but since January 2, 1933, "the principal part of their function regarding piece rating, viz., establishment of standards of output and piece rates, fell off," according to the textbook of 1946.[45] They are, in fact, boards for the settling of disputes between individual employees and management concerning the application of the existing labor regulations, that

[42] Aleksandrov, *op. cit.*, note 10 at 311 *et seq.;* Labor Legislation (1947) 242.

[43] U.S.S.R. Laws 1928, text 495.

[44] Aleksandrov, *op. cit.*, note 10 at 313; Labor Legislation (1947) 243.

[45] *Id.* 314.

is to say, like committees on grievances. In some instances the aggrieved party must bring his grievance before the board before going to court or elsewhere.[46] Representatives of the management and of the workers' committee have equal votes, and if no accord is reached the aggrieved may go to court. The awards are final but may be revised ex officio by higher authorities; if they set the award aside the aggrieved party may then go to court.[47] In some other instances, there is a choice between going to court or to the board.[48] Finally, there are instances in which the party may not appeal to a court or board but only to higher administrative authorities.[49] Consequently, the soviet regulation of labor

[46] *Lex cit. supra*, note 43, Aleksandrov, *op. cit.*, note 10 at 314–315 and Labor Legislation (1947) 247, class with this group disputes involving the following: (1) transfer to other work and payment connected with it; (2) amount of wages if the standard of output is not achieved; (3) dismissal because of unfitness or violation of duties; (4) amount of compensation for tools owned by the employee; (5) issuance of work clothes, special food rations or compensation therefor in money; (6) granting of shortened hours of work or special leave; (7) amount of wages in case the employee replaces another who is paid at a higher rate; (8) payment for preparation of assigned piecework; (9) payment for unfinished piecework assignments; (10) deduction for damages in cases of limited liability (see *infra* VI); (11) payment during suspension from work; (12) payment for unused leave; (13) amount of regular bonus; (14) payment for overtime; (15) payment during probation; (16) deprivation of benefits in case of failure to fulfill duties.

[47] Code of Civil Procedure, Section 21, Note, see Vol. II, No. 44, the ex officio review is discussed in Chapter 24, II.

[48] In instances where the case is not exempt from the jurisdiction of the court and is not assigned to the jurisdiction of the piece-rate and disputes board.

[49] Here belong: (a) cases involving dismissals of employees who have the right of employment and dismissals of others, or of executives enumerated in lists approved by the People's Commissars for Labor or of elected officers; (b) cases involving imposition of disciplinary penalties on the same employees; (c) cases involving imposition of disciplinary penalties (including dismissal) in branches of economy for which special disciplinary codes have been enacted (railroads, merchant marine, internal waterway shipping lines, postal service, telegraphs, etc., see *infra*, IV in fine); (d) cases involving dismissal by request of the trade-unions and the Ministry of State Control; (e) cases involving distribution of living quarters and other benefits which are not directly connected with duties under the employment

disputes offers the employee, at best, redress against individual abuses committed by the management. However, in the branches of employment in which the management enjoys especially broad disciplinary powers, and in which the so-called disciplinary codes are in effect (see *infra* IV), he may not appeal to the court nor to a conciliation board but only to his superiors.

It may also be mentioned that the soviet constitutions, laws, decrees, and legal writings are silent on the right to strike. Its absence is simply taken for granted.

5. Conclusion

In summarizing this survey of the recent tendencies in soviet labor legislation, it may be stated that the abolition of private ownership of the instruments of production and their transformation to socialist ownership has not been followed by an increase of rights of labor in labor law. On the contrary, in comparison with the legislation of the New Economic Policy period, when private enterprise was tolerated, the legal status of labor has changed for the worse. All the channels through which labor can plead its case in the capitalist world—legislation, courts, administrative agencies and trade-unions—are in the Soviet Union the agencies of the principal employer of industrial labor—the government. Another feature of the present soviet labor law is the numerous penal provisions. The labor law is to a large extent criminal law.

contract. Aleksandrov, *op. cit.*, note 10 at 315; Labor Legislation (1947) 243; *lex cit. supra*, note 43; Act of October 13, 1929, U.S.S.R. Laws 1929, text 670; Act of March 20, 1932, R.S.F.S.R. Laws 1932, text 152. Employees coming under clause (a) above are listed in (1930) Izvestiia of the Labor Commissariat No. 1/2.

III. Wages and Salaries

1. In General

The Labor Code provides for payment by time or by piece and leaves the determination of individual pay to the collective agreements and the individual employment contracts, provided the remuneration rate is not less than the minimum wage fixed by the competent authorities (Sections 58–60). These provisions may be considered totally out-of-date. In the first place, since 1931 the principle of piecework has been given official preference.[50] In 1933–1934, in large industrial plants (over 15 workers), 70 per cent of the work done was paid for at piece rates.[51] Secondly, the practice of drafting the labor conditions in the form of a collective agreement was abandoned and by 1935 "the transition from regulation of wages and salaries by a contract to their regulation by the government was completed."[52] When the making of collective agreements was resumed, in March–April, 1947, it was expressly ordered, as mentioned above, that the collective agreements "must indicate" the wage rates approved by the government, and no rates, schedules, and methods of their computation, not approved in advance by the government may be included in the collective agreements.[53] Thus, the instruments called collective agreements now include rates of wages, but these are not determined by an agreement between the management and the labor organization. Being taken from an order of higher governmental

[50] Grishin, Soviet Labor Law (in Russian 1936) 167, 168. See also *infra*, note 59.

[51] Socialist Construction of the U.S.S.R. (in Russian 1936) 526.

[52] Aleksandrov, *op. cit.*, note 10 at 51; *id.* note 3 (1944) at 22, see also *supra* II, 1.

[53] *Loc. cit supra*, note 22.

agencies, these rates merely specify the application of the order in the establishment concerned. Soviet writers emphasize that as before the compensation of individual categories of workers is established by governmental regulation and not by contractual agreement. The all-embracing governmental plan, they say, does not exclude collective agreements altogether, as some writers thought in 1946, but certainly does exclude wages from free bargaining.[54] The definition of schedules and rates of wages and salaries is reserved to the higher agencies of the principal employer—the government.

It is significant that the compilation of labor laws which appeared in 1947 omitted reproduction of the text of Section 58 of the Labor Code, which reads:

> 58. The amount of an employee's remuneration for his work shall be determined by the collective agreements and individual employment contracts.

The following explanation is given instead of these provisions:

> The amount of wages and salaries is at the present time fixed by the decisions of the government (or on the basis of its directives) by means of governmental planned regulation of wages and salaries for separate groups and categories of workers applying the principle of differentiation depending upon the importance, character, and conditions of work in the particular branch of national economy or government administration, and rewarding with higher pay the most qualified categories of workers.
>
> The agreement of parties plays a subordinate role in the determination of the amount of wages or salaries. It should not be contrary to law and is allowed only within limits strictly provided for by the statute, for example, where the precise amount is fixed in instances in which the approved table of organization defines the rate as "from"-"to"; or fixing the

[54] Moskalenko, *op. cit.* supra, note 23 at 16, see also Aleksandrov, *op. cit.*, note 10 at 203, 211 *et seq.*

remuneration for part-time employment of a person holding another position, and the like.[55]

Although the Labor Code provided for minimum wage rates, such general zonal rates were established for the last time on December 5, 1927.[56] A Law of November 1, 1937, fixed the minimum wage rates only for workers in government industrial and transportation enterprises at 115 rubles per month for those paid by time and at 110 rubles per month for those paid by piece.[57] But, on the one hand, inflation made these rates obsolete, and on the other hand, governmental detailed regulation of wages, according to the soviet jurists, made a minimum rate superfluous.[58] It may be added that the soviet labor law drifts away from guaranteeing minimum earnings (see *infra*).

The manner in which the soviet government regulates wages and salaries is far from simple. Nationwide differentiated progressive scales of piecework rates with bonuses for extra efficiency are enacted from time to time for individual branches of industry or individual categories of employees.[59] However, the wages actually paid in a given enterprise should not exceed a certain sum appropriated for this purpose by the higher authorities entrusted with the administration of the particular

[55] Labor Legislation (1947) 65. In no particular connection with the subject matter of the discussion, the compilers add to the quoted passage that "it should be borne in mind that in addition to the wages and salaries in cash the workers receive material security in the form of the use of sanatoria, rest homes, etc." It is evident that these "socialized wages" are also exempt from any bargaining but are subject to government regulations.

[56] Order of the Commissar for Labor (1927) Izvestiia of the Commissariat for Labor No. 52.

[57] U.S.S.R. Laws 1937, text 340.

[58] Aleksandrov, *op. cit. supra*, note 10 at 51; Labor Legislation (1947) 66.

[59] It is generally considered that this policy was inaugurated by the regulation of wages for the miners of the Donets Bassein region, U.S.S.R Laws 1933, text 183, and for railroad employees *id.*, text 242.

branch of industry. Each year the Council of Ministers assigns a certain amount as a "wage fund" for each governmental department (prior to 1946 called People's Commissariat and at present Ministry) managing an entire branch of industry. The Ministry allocates appropriated amounts for various categories of laborers, such as workers, clerks, technicians, executives, et cetera, and distributes the appropriations among the governmental bureaus (see *supra,* Chapter 11) administering a narrower branch of industry, such as the sugar industry, the cotton industry, the coal mines of a certain district, et cetera. The bureaus distribute the appropriations among individual enterprises, and the manager allocates the amount of wages to be paid in each shop of the enterprise. However, this scheme, introduced by the Resolution of the Council of People's Commissars of February 21, 1933,[60] was considerably complicated by the creation of a director's fund for each unit doing business on a commercial basis,[61] and other funds from which some of the workers' bonuses are paid, by subsequent regulation of the "wage fund" in two Acts of August 15, 1939,[62] and by separate decrees enacting further developments in progressive piecework rates in the individual branches of industry.[63]

[60] U.S.S.R. Laws 1933, text 75; *id.* 1935, text 208.

[61] See Chapter 11, 3 in fine and Vol. II, Nos. 14–17.

[62] U.S.S.R. Laws 1939, texts 395, 396; *id.* 1938, text 51; Instruction of the U.S.S.R. Commissar for Finance of March 31, 1941, No. 246/36.

[63] As examples of such decrees, we may refer to the schedule of 1938 for textile industries (U.S.S.R. Laws 1938, text 214), to the schedule of 1939 for building construction (*id.* 1939, text 119), and to the schedules enacted by the Council of People's Commissars on June 1, 1942, for stevedores, on August 21, 1942, for miners and workers in the ferrous industries, and on October 1, 1942, for workers in chemical and fire resistance industries. These schedules are abstracted in Gorshenin, "Problems of Legal Regulation of Labor in the Legislation of the Time of the Patriotic War" (in Russian 1945) 1 Trudy (Transactions) of the Law School of the University of Moscow, forming No. 76 of the Uchenye Zapiski of the same University,

The schedules established for separate branches of industry are highly differentiated and therefore need not be analyzed here. It suffices to state that two principles are common to all such schedules: progressive piecework rates and bonuses. There are two kinds of bonuses. First, there are bonuses periodically paid as part of the wages and based on objective criteria of the output. These bonuses are paid from the fund of wages in each establishment. Secondly, there are individual bonuses given at the discretion of the administration. These are paid from the director's fund. From July 1, 1941, grants to these funds have been discontinued. Since 1942 individual bonuses have been given from special funds "assigned by the government for bonuses to workers of establishments which won in the union-wide socialist competition." [64] But in 1946 the director's fund was restored. This time all the plants and factories have been divided into three groups, the percentage credited to the fund from planned profit or savings of each group being 2, 4, and 10 per cent, and from the profit or saving in excess of the plan 75, 50, and 25 per cent respectively. The higher the rate for planned accomplishments, the lower is the rate for excess profit or saving. In some industries, including most of the industries producing consumers' goods, classed with

72, 73. A most complete list of laws and decrees regulating wages and salaries in individual branches of national economy and public administration is given in Labor Legislation (1947) 95–98.

It is interesting to note that bonuses were introduced for professionals who are not directly in charge of an establishment but merely supervise the collective farming. For example, agricultural engineers at the machine-tractor stations and local agricultural offices receive bonuses depending upon the efficiency of the collective farms under their supervision. See U.S.S.R. Laws 1944, text 219. A highly progressive schedule is established for tractor drivers and combine operators. U.S.S.R. Laws 1942, texts 3, 73, and 88.

[64] Aleksandrov, *op. cit.* (1944) note 3 at 86; Labor Legislation (1947) 74, note 2.

those having a 2 per cent grant from planned profit, the total contribution to the fund may not exceed 5 per cent of the total wage fund assigned to workers directly engaged in production.[65]

Individual bonuses to employees in government offices are paid from a bonus fund, calculated for each office at ¼ per cent of the total fund of salaries and 50 per cent of the savings from that fund but not to exceed 2 per cent thereof. However, the minister concerned may allow this limit to be exceeded.[66]

In the so-called local industries, serving primarily local needs, until recently 50 per cent of profits in excess of the planned profit was left with the establishment concerned, 25 per cent thereof being assigned for bonuses to workers who fulfilled or exceeded the plan.[67] But this provision was superseded by the new regulation of the director's fund in 1946.

In any event, normally the wage rate of an individual worker is determined by his occupational classification and the wage fund available, while the actual pay obtained by him depends, within these limits, upon his personal efficiency, the available bonus fund, and, to an extent, upon the discretion of the administration of the establishment where he is employed. "Especially valuable specialists and practitioners" may be granted so-called "personal salaries," i.e., salaries in arbitrary amounts outside any scale. The procedure for assigning such "personal salaries" is regulated by the Act of August 20, 1938, and the Directive of April 5, 1945.[68]

[65] See Vol. II, Nos. 16, 17.

[66] Act of June 17, 1935, U.S.S.R. Laws 1935, text 277, as amended by *id.* 1936, text 169.

[67] Act of August 22, 1945, Section 27, U.S.S.R. Laws 1945, text 98.

[68] U.S.S.R. Laws 1938, text 229. This law repealed the Act of March 8, 1930, *id.* 1930, text 186, with all decrees issued for its implementation. For

Although the soviet law provides for minimum rates, it does not guarantee any minimum pay for the worker, regardless of his efficiency. In order to obtain the rate provided for in the schedule, he must attain the standard of output. The respective provisions of the Labor Code as amended in 1934, which are still in force, read:

57. If an employee of a governmental, public, or co-operative enterprise, institution, or business, through his own fault, fails to attain the standard of output prescribed for him, he shall be paid according to the quantity and quality of his output, but shall not be guaranteed any minimum wage. In other enterprises and business (private enterprises, including those under a concession), such an employee shall be paid not less than two thirds of his scheduled rate.

If failure to attain the standard has occurred not through the fault of the employee, he shall in any case receive not less than two thirds of his scheduled rate.

If an employee persistently fails to attain the standard under normal working conditions, he may be dismissed in accordance with Section 47, or transferred to other work (as amended).

Under the Code of Labor (Section 56),[69] the standards of output for each job were to be established by agreement between the administration of the establishment and the trade-union. At present, the procedure in establishing standards of output and rates is regulated by the Acts of June 4, 1938 and January 14, 1939,[70] pursuant to which the general orders for revision are issued by each minister together with the Central Council of the Trade-Unions. As an example, the textbook

the directive see (1945) Financial and Economic Legislation No. 6; Aleksandrov, *op. cit.*, note 10 at 214.

[69] Labor Code, Section 56:

56. A standard of output shall be fixed by the management of the enterprise or institution in agreement with the trade-union or the competent official of the trade-union (Sections 151 and 156).

This section is not quoted in Labor Legislation (1947) 61 as obsolete.

[70] U.S.S.R. Laws 1938, text 178; *id.* 1939, text 38; Labor Legislation (1947) 63.

of 1944 refers to the Order of the Minister of Aviation Industry of April 20, 1942, No. 117. By this order, new standards of output and new rates are to be approved by the directors of individual plants upon the recommendation of the heads of the shops, and are immediately put into effect.[71] In some instances, standards of output and rates are directly enacted by the Council of Ministers (prior to March, 1946, of People's Commissars), e.g., the schedule for the cotton textile industry and for motor transportation.[72] Thus, the trade-unions, though controlled by the government and the Communist Party, have in certain instances no word to say in establishing the major factors determining wages.

The resumption of collective agreements announced in March, 1947, does not affect the decisive voice of top government agencies in defining the standards of output. Moreover, the recent writers and the resolution of the trade-unions inaugurating the policy of collective agreements insist upon a method of calculating these standards which does not promise any benefit for labor and implies a reduction of wages. The required standards should not be deduced from the statistics of production achieved, as is often the case. Actual average results in the past do not have to be accepted as standards. New standards should be devised by applying the so-called technical norm, i.e., the results which may be expected through the use of the best technique available under the circumstances, according to the experts.[73]

Wages also have been affected by the increase of nor-

[71] Aleksandrov, *op. cit.* (1944) note 3 at 94.

[72] Act of August 15, 1938, U.S.S.R. Laws 1938, text 214, also *id.* 1939, text 119.

[73] *Lex cit. supra,* note 20, Section 6; Aleksandrov, *op. cit. supra,* note 10 at 219, Labor Legislation (1947) 62.

mal working hours from seven to eight per day (see *infra* VII).

2. Stoppage

Special provisions regulate wages in case of stoppage. Section 68 of the Labor Code, as amended in 1932, reads:

> 68. Wages shall not be paid in a governmental, co-operative, or public enterprise or business for the duration of a stoppage of work caused through the employee's fault.
>
> Half the scheduled time rate of an employee of equivalent qualification shall be paid for the duration of a stoppage of work through no fault of the employee.
>
> In the metallurgical, mining, and coke industries, payment for a stoppage of work through no fault of the employee shall amount to two thirds of his scheduled rate.

According to an order of the People's Commissar for Labor of the same year, which is still in force, "employee's fault" shall mean failure to observe instructions given during work, negligence in work, inability to work in an orderly manner, and any other contravention of shop rules or technical regulations committed intentionally or through negligence.[74]

If the employee fails to notify the management forthwith whenever a stoppage of work begins or of a cause which is liable to give rise to a stoppage, payment shall not be made for the stoppage and the employee shall be penalized.[75]

Employees idle in consequence of a stoppage may be at once transferred to other work, even to work of a lower grade or to another enterprise. In some cases,

[74] Order of the People's Commissar for Labor of February 25, 1932, No. 31, Section 10; see also Aleksandrov, *op. cit.* (1944) note 3 at 98, 99, note 10 at 223 *et seq.*

[75] *Id.*, Sections 2–3, 9.

higher paid workers shall receive their regular pay.[76] If an employee refuses to be transferred to other work, payment shall not be made for the stoppage, and the refusal shall be deemed a breach of labor discipline.[77]

In private business, a stoppage through no fault of the employee shall be paid according to the average earnings, if the stoppage does not exceed three days; otherwise, at the full scheduled rate.[78]

3. Spoilage

Payment shall not be made for work completely spoiled (wholly unfit for use) through the employee's fault in governmental, co-operative, or public enterprises or businesses. If the work is partly spoiled through the employee's fault, i.e., if the quality of the product does not satisfy the requirements laid down for it, payment shall be made at a reduced rate. Such rate is fixed by the management.

Work completely spoiled through no fault of the employee shall be paid at two thirds of the scheduled time rate; work partly spoiled is paid in such cases at a reduced rate fixed by the management, provided that the payment is not less than two thirds of the normal time rate.[79] Payment shall be made at the standard piece rate if the spoilage is due to defects in the metal to be treated which are detected after not less than one day has been spent in working the metal or assembling the parts.[80] In any case, it is the duty of the employee to

[76] *Id.*, Sections 4–5.
[77] *Id.*, Section 5.
[78] Order of the Commissariat for Labor of January 26, 1932 (in Russian 1932) Izvestiia Narkoma Truda No. 5/6; Grishin, Soviet Labor Law (in Russian 1936) 183; Aleksandrov, *op. cit.*, note 10 at 224.
[79] Labor Code, Section 68[1]; order cited *supra*, note 74, Section 6.
[80] Labor Code, Section 68[1] Note 1.

notify the management that the articles produced by him constitute defective work; otherwise, he shall not be paid for the work and shall be responsible for the material spoiled.[81] In private enterprises, work spoiled through no fault of the employee must be paid in full.[82]

During the time fixed by the authorities to be spent in becoming familiar with a new process, work spoiled through no fault of the employee shall be paid at the full rate. Such time shall not exceed three months.[83]

The financial responsibility of employees for property of the employer is regulated by Sections 83–83 [6] of the Labor Code (see *infra* VI).

IV. Labor Discipline

The Law of November 15, 1932,[84] declared that failure to appear for a single working day without justifiable cause is a sufficient and mandatory reason for dismissal. However, several enactments have since introduced stricter rules of discipline. Thus, an Act of December 28, 1938,[85] was directed against tardiness, leaving work before the scheduled time, undue prolonging of lunch time, and loitering on the job. Those who committed such infractions were declared to be subject to warning, to transfer to a lower grade job or position, and, for three such infractions in one month or four infractions in two months, to dismissal (Section 1). An

[81] *Lex cit.*, note 74, Section 9.
[82] See *supra*, note 78.
[83] Labor Code, Section 68 [2].
[84] R.S.F.S.R. Laws 1932, text 371.
[85] Joint Resolution of the U.S.S.R. Council of People's Commissars, the Central Committee of the All-Union Communist Party, and the All-Union Central Council of Trade-Unions, of December 28, 1938, Concerning Consolidation of Labor Discipline, Improvement of the Practice of Social Security, and Suppression of Abuses in This Field, Izvestiia No. 301, December 29, 1938, U.S.S.R. Laws 1939, text 1.

authentic interpretation of the Act of December 28, 1938, issued on January 9, 1939,[86] states that penalties milder than dismissal should be applied only in cases of tardiness not exceeding twenty minutes. A single tardiness exceeding twenty minutes should result in immediate dismissal. Later, the Edict of June 26, 1940,[87] subjected the employee in such a case to compulsory labor without confinement for up to six months at his usual place of work, with a reduction of wages of up to 25 per cent, instead of to dismissal. This penalty was to be inflicted by the court.

The Act of December 28, 1938, stated further that managers of establishments, sections, and shops would be subject to dismissal and penal prosecution in court if they failed to inflict the above-mentioned penalties (Section 2). The act also declared that an employee who was dismissed for an infraction of labor discipline, or who left a job of his own accord, would be evicted within ten days from the living quarters assigned to him on account of his employment (Section 12). Several other disadvantages were introduced for those who did not remain long enough on the job (Sections 4, 11). In case of sickness, only employees who had worked in the same establishment continuously for at least six years were entitled to compensation to the extent of 100 per cent of their pay; those who had been continuously employed in the same establishment for less than two years could receive only 50 per cent. Vacations, disa-

[86] Interpretation of the Act of December 28, 1938, issued jointly by the same authorities on January 9, 1939, Izvestiia, January 9, 1939. See also (1939) Soviet Justice No. 2, 13.

[87] Edict of the Presidium of the Supreme Soviet of June 26, 1940, Introducing an Eight-Hour Working Day, a Seven-Day Week, and Prohibiting Unauthorized Change of Employment, Vedomosti, July 5, 1940, No. 20, and August 22, 1940, No. 28.

bility pensions, priority rights to rest homes and sanatoria, and other social security benefits were made contingent upon sufficiently long employment in the same establishment (Sections 5–10, 13–23).

Likewise for the purpose of strengthening labor discipline, foremen (masters) in heavy industry were granted extensive rights and responsibilities by the Decree of May 27, 1940.[88] Their wages were increased, and a bonus system was established for them. Foremen are called upon to review production quotas and piecework rates, to fix wage scales, to make tests, to hire and discharge workers after consultation with the head of the shop, to fine and reward for bad or good work, and to have a say in the distribution of bonuses.

Cases of so-called petty larceny (i.e., larceny of property under fifty rubles in value) and acts of hooliganism committed by employees at their place of employment, which had been handled since 1930 by the "comrades' courts" and disposed of by fine or public censure,[89] were declared by the Edict of August 10, 1940, to be crimes strictly punishable by imprisonment for one year, where the offense does not come under a law providing for a more severe punishment.[90]

All these measures enforcing labor discipline were summarized in the Standard Rules of Internal Labor Organization for Employees of Governmental, Cooperative, and Public Establishments and Offices, enacted by the U.S.S.R. Council of People's Commissars on January 18, 1941.[91] The rules stress that "every

[88] U.S.S.R. Laws 1940, text 361.
[89] R.S.F.S.R. Laws 1931, text 160.
[90] Vedomosti 1940, No. 28.
[91] U.S.S.R. Laws 1941, text 63. For translation see Vol. II, No. 40.

violation of labor discipline" must be visited either with a disciplinary penalty or prosecution in court. The disciplinary penalties are admonition, reprimand, severe reprimand, transfer to other lower paid work, and demotion to a lower post. Disciplinary penalty is imposed by the management as soon as it becomes aware of the violation. No penalty may be imposed after the expiration of one month from the date when the violation is ascertained. The imposition of the penalty does not relieve the employee from the duty to compensate for damage caused by the defective work.[92] The rules relegate to the court the imposition of punishment for larceny and acts of hooliganism or disorderly conduct committed at the place of employment. Among the violations, the rules specify tardiness, loitering on the job, and absenteeism. Coming late to work, going out for lunch ahead of time, being late in returning from lunch, or leaving work ahead of time, if done without a justifiable reason, are subject to disciplinary penalties only in instances where the loss of time does not exceed twenty minutes and does not occur thrice a month or four times within two consecutive months. In the latter instances, these infractions are considered absenteeism and are punished in court. If an employee appears at work in a state of intoxication, he is guilty of absenteeism. It is also stressed that unauthorized quitting a job is an offense punishable in court. Loitering on the job is subject to disciplinary penalties.[93]

A new disciplinary code for workers and salaried employees of railways in the U.S.S.R. of April 23, 1943,[94]

[92] See *infra* VI.

[93] For discussion by the soviet jurists of the fine points in the application of these provisions see Chapter 6, p. 204. See also *infra* IX.

[94] Issued as a separate pamphlet.

provides for strict military discipline among railroad employees. It establishes such penalties as arrest not to exceed twenty days imposed at the discretion of the superior. Appeal may be made to the next higher superior whose decision is final. Appeal must be filed within three days with the superior who imposed the penalty. Similar provisions are contained in the new disciplinary codes for employees of the maritime and inland waterways transportation lines; employees of the main bureau of the Civil Air Fleet; postal, telegraph, and radio employees; employees of the municipal electric power plants; militarized watchmen of warehouses; workmen in air defense and fire protection of defense industries.[95]

V. Responsibility of Executives Under the Criminal Law

The soviet law provides for the punishment of directors and technical personnel of governmental business units for poor quality in their output. In 1934, they were made liable to imprisonment for from five to ten years for "the release of products of poor quality or products insufficiently completed, by industrial establishments, on account of the criminally negligent attitude of directors and technical administrative personnel toward the responsibilities with which they are entrusted."[96] Simultaneously, "the mass release or systematic release of products of poor quality from commercial establishments" was made punishable by imprisonment for up to five years. Failure to observe the established standards

[95] Aleksandrov, *op. cit.* (1944) note 3 at 129, note 10 at 272; Labor Legislation (1947) 54, 55.

[96] R.S.F.S.R. Laws 1934, text 51, incorporated into the Criminal Code as Section 128*a*.

was made subject to the penalty of imprisonment for up to two years.[97]

Under these provisions, a penalty might be imposed if in the first instance defects were caused by the "criminal negligence" of executives, or if the release of defective goods had a mass or systematic character. These prerequisites were dropped by the Edict of the U.S.S.R. Presidium of July 10, 1940,[98] which provided as follows:

1. The release of products of poor quality, or of those insufficiently completed or released in violation of the established standards, is an anti-State crime equivalent to sabotage.

2. The directors, chief engineers, and chiefs of the divisions of technical supervision of industrial establishments shall be punished by imprisonment for a period of from five to eight years for the release of products of poor quality or those insufficiently completed, or the release of production in violation of the established standards.

3. The U.S.S.R. Attorney General shall secure the execution of this decree.

VI. Financial Responsibility of Employee to Employer

The Labor Code, as amended in 1930 and 1932,[99] and some other statutes establish special rules regarding financial responsibility of employees for damage caused to the employer. On the basis of scattered provisions the soviet jurists distinguish three types of responsibility: liability for the full amount of actual damage (Labor Code, Section 83 [1]), liability limited to a certain portion of the employee's pay (Section 83), and

[97] R.S.F.S.R. Laws 1931, text 162, incorporated into the Criminal Code as Section 128*b*.

[98] Vedomosti 1940, No. 23, incorporated into the Criminal Code by the Edict of the R.S.F.S.R. Presidium of November 16, 1940, as an amended text of paragraph 1 of Section 128*a*. By the same edict, Section 128*b* was repealed.

[99] Labor Code, Sections 83 through 83 [6], translated in Vol. II, No. 41.

increased liability when the employee must reimburse a sum exceeding the actual damages several times, i.e., multiplied by three, five, or even ten. Section 83[4] of the Labor Code, which introduced this type of liability, is not quite explicit. It provides for liability in accordance with a special schedule to be issued by the Commissariat for Labor, that existed at the time, but such a schedule, issued on June 1, 1932, and other enactments made clear that the liability under the schedule means liability in excess of actual damage.[100]

Liability for the full amount arises if the damage was caused by a criminal offense of the employee, prosecuted in court, also, where such liability is stipulated in writing in the employment contract or is provided for by special laws, as well as when damage is caused outside the performance of the employee's duty (Labor Code, Section 83[1]). Thus, the law provides that the directors of trusts and plants and their deputies are liable for safekeeping and proper handling of property of the establishments under their charge.[101] Various kinds of employees, whose particular duty is safekeeping of merchandise, are also liable in the same manner.[102] The full liability is ordinarily imposed by contract upon cashiers, store and stock managers, stock clerks, managers of departments of stores, shipping clerks, and the like.[103] Bus and truck drivers are liable for the full cost of excessively spent fuel [104] and postal employees are responsi-

[100] Labor Legislation (1947) 121.

[101] *Id.* 129; U.S.S.R. Laws 1927, text 392, Sections 20, 26.

[102] *Ibid;* Act of July 20, 1930, R.S.F.S.R. Laws 1930, text 521.

[103] *Id.* 130; Resolution of the Commissar for Labor of October 29, 1930 (in Russian) Izvestiia of this commissariat No. 31/32.

[104] *Ibid;* Act of November 18, 1940, Art. V, Section 2, U.S.S.R. Laws 1940, text 762.

ble for the full amount of damage paid by the post office to the sender for mail lost, spoiled, or delayed.[105]

The liability of an employee is limited to one third of his scheduled rate if the damage is caused by his negligence in work, by his violation of law not constituting a criminal offense, by a violation of shop rules or the employer's special instructions and orders. This type of liability applies in cases of injury, destruction, or loss of equipment or livestock, in cases of failure to collect full payments, of loss or depreciation of documents entrusted, and also where the employer has been forced to make unnecessary payments, including penalties. The same responsibility arises in case of improper expenditure of money assigned for business needs (Labor Code, Section 83).

The liability of an employee is higher in case he spoils, through negligence, raw material or semifinished or finished products. In these instances the employee is liable for up to two thirds (and not one third) of his average earnings, and not of his scheduled rate.[106] The executive and technical personnel of government enterprises are responsible for the proper organization of accounting for and safekeeping of material, products, tools and other property, and for taking steps to prevent theft, destruction, and spoilage of such property. This liability is limited to one month's average earnings of the employee. The executives are also responsible within one third of their scheduled rates for failure to take steps to prevent stoppage and spoilage.[107]

[105] *Ibid;* Act of November 20, 1933, Section 8, U.S.S.R. Laws 1933, text 405.

[106] *Id.* 135; Instruction of the People's Commissar for Labor of June 1, 1932, Section 3 (in Russian) Izvestiia of this commissariat No. 17/18.

[107] *Id.* 123; instruction cited *supra,* note 106, Section 9; order cited *supra,* note 74, Section 11.

Increased liability arises in various degrees, depending upon the nature of guilt and the kind of property damaged. The highest liability is that of managers of fuel stocks at machine-tractor stations and governmental farms for unaccountable shortage of fuel—ten times the price of the shortage, provided their acts do not incur penal prosecution.[108] In case of theft, wanton destruction, or intentional spoilage of raw materials, semifinished or finished products, as well as of instruments, work clothes, and other property issued for the use of an employee, he is liable to pay fivefold the amount of damage.[109] If the destruction, spoilage or loss of tools, work clothes, and other property issued to an employee occurs through his negligence, he is liable up to an amount fivefold the damage.[110] Here this is the maximum limit of his liability, while in the preceding instance the fivefold amount is mandatory. In instances of theft, unaccountable shortage, or mishandling of merchandise consisting of industrial products, the employee responsible for these acts must pay fivefold the commercial price of the stolen, missing, or spoiled products.[111] Employees of governmental farms guilty of loss of horses and other livestock must pay three times the price of the animals lost.[112]

The amount of damages is deductible from the employee's pay by the management on its own authority after notification to the employee. In instances of lim-

[108] *Id.* 136; Act of June 20, 1942, Section 12, Socialist Agriculture, June 27, 1942 (in Russian); Order of the Attorney General of June 23, 1942.
[109] *Id.* 135; Instruction cited *supra*, note 106, Sections 1, 2.
[110] *Ibid.*
[111] *Op. cit.* 126, 127; Resolutions of the State Committee of National Defense of January 22 and May 22, 1943, Order of the People's Commissar for Commerce of January 29, 1943, No. 50; Directives of the People's Commissar for Finance of September 9, 1943, No. 582, and of October 28, 1944, No. 592/D–39. See also Chapter 15 at note 27.
[112] *Id.* 136; Act of May 12, 1943, Section 23, Izvestiia, May 13, 1943.

ited liability, the deduction may be made only within one month from the date on which the management has ascertained the amount. The employee may object to the deduction within seven days, in which case the deduction is suspended. In cases of limited liability, the management has to enforce this liability through the arbitral shop board or the court. In instances of full liability, the management must sue in court. In instances involving increased liability no period of limitation for deduction is established, and the objection of the employee does not suspend the deduction. The employee may, however, appeal against the deduction to an arbitral shop board (dispute and piece-rate board). The general three-year period of limitation applies to any suit for damages in court. At each payday only 20 or 25 per cent of the pay may be deducted and if other deductions are made at least 50 per cent of the pay due must be left to the employee. Only the actual damage and not the profit lost is taken into account when the amount of damage is established.[113]

It may also be mentioned that the Ministry of State Control has the power to order deductions from the salaries of government officials to cover the damage caused to the treasury by illegal spending of governmental funds in excess of budgetary assignments, e.g., where wages were paid in excess of the wage fund (see *supra* III). Such deductions may not exceed three months' salary of the official.[114]

VII. Hours

The Labor Code provided for an eight-hour working day (Section 94). However, several laws enacted in

[113] Labor Code, Sections 83^{2}, 83^{5}.
[114] *Id.*, Section 83^{3}; Rules of May 13, 1941, U.S.S.R. Laws 1941, text 248.

1929 and 1931 [115] introduced a normal seven-hour day and a six-hour day for especially dangerous jobs and for certain special instances, as well as a six-day week, so that each sixth day was a day of rest. A seven-hour day was written into the 1936 Constitution (Section 119).

However, the Edict of the federal Presidium of June 26, 1940, lengthened the working day to eight hours for plants and offices, except for especially dangerous jobs, for which the six-hour day was retained. Moreover, the edict introduced the seven-day week, restoring Sunday as a day of rest.[116] This meant an addition of thirty-three hours per month for laborers and of fifty-eight hours for office workers who before this edict worked six hours per day. Salaries paid on a time basis remained unchanged, and the rates for piecework were lowered so that one would earn the same wages in eight hours which he had before earned in six or seven hours.[117]

The provisions of the 1936 Constitution were changed only seven years later, on February 25, 1947, when a new amended text of Section 119 was enacted, wherein an eight-hour day in place of a seven-hour day is mentioned.[118]

The Edict on Wartime Working Hours of June 26, 1941, authorized the managements of establishments, with the permission of the Council of People's Commissars, to introduce overtime of up to three hours a day for the entire personnel of an establishment or a definite

[115] U.S.S.R. Laws 1929, texts 30, 586, 587; *id.* 1931, text 448.

[116] Vedomosti 1940, No. 20, *supra* note 87.

[117] Decrees of the Council of People's Commissars implementing the edict cited *supra,* note 87, U.S.S.R. Laws 1940, texts 385, 386, 387.

[118] For new text of this section, see *supra,* p. 73, note 75.

group within it. Minors under sixteen years of age were not to be given more than two hours overtime per day. Pregnant women from the sixth month on, and those nursing babies during the first month of nursing, were exempted from overtime. The overtime rate was set at one and one-half times the regular rate.[119]

The Labor Code provides for annual leave with pay, normally of two weeks' duration, for employees who have remained in the same establishment for at least eleven months. However, the same Edict of June 26, 1941, cancelled all annual leaves except sick leaves. It provided for special compensation to be paid at once for leaves not used. Later, as a temporary measure, it was decreed that such compensation be deposited by the management with a savings bank in the name of the employee, to be refunded after the war with 3 per cent annual interest.[120] Annual leave was restored by the Edict of June 30, 1945, beginning with July 1, 1945, and payment for unused leave was regulated by the Act of September 13, 1945.[121]

Special leaves are allowed to pregnant women before and after delivery (see *supra,* p. 132).

VIII. Labor Record Books and Registration of Specialists

A general registration of professional workers with higher education was ordered by the Decrees of March 4 and October 14, 1938.[122]

By the Decree of December 20, 1938,[123] "labor books,"

[119] Vedomosti 1941, No. 30.
[120] Edict of April 9, 1942, Vedomosti 1942, No. 13; see also *id.* 1943, No. 3; *id.* 1945, No. 4.
[121] Vedomosti 1945, No. 37; U.S.S.R. Laws 1945, text 129.
[122] U.S.S.R. Laws 1938, text 272.
[123] *Id.,* text 329; *id.* 1939, text 322; *id.* 1940, text 408; *id.* 1941, text 153.

i.e., a certain kind of labor passport, were introduced. Each employee (salaried as well as wage-earning employee) is provided with an individual record book giving his name, age, education, profession, labor record, changes of employment, reasons for such changes, and rewards (Section 2). The books are to be prepared and kept by the administration of the establishment and given to the employee only when he leaves. Nobody may be hired who does not present such a book. The owner of the book who loses it through negligence is subject to a fine imposed by the administration of the establishment.

IX. Compulsory Transfer of Specialists and Skilled Laborers: Freezing on the Job

The Act of December 28, 1938, Section 3, required a month's notice from an employee desiring to leave his place of employment.[124] But the Edict of June 26, 1940, has frozen employees of governmental, co-operative, and public establishments and offices on their jobs.[125] The edict prohibits employees from changing their place of employment or from resigning without the express permission of the management of the establishment where they are employed (Section 3). Permission may not be denied when the transfer or resignation is required on account of the employee's health or his enrollment in an institution of higher learning or a vocational school (Section 4). Leaving one's place of employment without authorization is to be punished in a judicial procedure by imprisonment for a period of from two to four months (Section 5). Managers who employ those

[124] See *supra*, note 85.

[125] See *supra*, note 87, also Labor Legislation (1947) 36, 37.

who have quit their previous jobs without permission, or who fail to bring before the court those who have so quit their jobs, are liable to penal prosecution (Section 6). Employees of defense industries and industries connected with these "on the principle of co-operation" are liable to imprisonment for from five to eight years in case of unauthorized quitting of the job, and such cases are triable by courts martial.[126]

These provisions are broadly interpreted. If an employee who has been convicted twice for absenteeism is serving a compulsory labor sentence without confinement at the place of his employment and commits an act of absenteeism (tardiness of over twenty minutes) again, he shall be prosecuted for unauthorized quitting of employment.[127] An employee who violates the shop rules for the purpose of being dismissed must be prosecuted in a like manner.[128] The U.S.S.R. Supreme Court has also held:

> A lengthy failure to appear for work may be considered absenteeism only in instances where the court has established that the employee had no intention to quit the given job. If the court establishes that the person concerned intentionally stayed away from work with the design to quit it without authorization, such act must be qualified as quitting of the job without authorization even if the perpetrator appears again on the job before the trial.[129]

The application of the provisions on absenteeism caused

[126] Vedomosti 1942, No. 2, see *infra* at note 142.

[127] U.S.S.R. Supreme Court, Plenary Session, Ruling of July 7, 1941, Collection of Rulings of the U.S.S.R. Supreme Court from June 23, 1941 to March 1, 1942 (in Russian 1942) 9. Aleksandrov, *op. cit. supra,* note 10 at 283.

[128] *Id.,* Ruling of December 25, 1941, *op. cit.* 21.

[129] *Id.,* Ruling of October 22, 1942 (1943) Judicial Practice of the U.S.S.R. Supreme Court No. 2, 4. Aleksandrov, *loc. cit.*

quite a discussion in the soviet legal press; this discussion is reported elsewhere.[130]

The Edict of October 19, 1940, gives the Ministers, i.e., the heads of federal government departments, the right to transfer technical personnel and skilled laborers, regardless of their wishes, from one establishment to another, irrespective of their geographical locations (Section 1). Special per diem and other forms of compensation are provided for the transferred employee (Section 2).[131] A series of decrees lists the jobs coming under the edict.[132]

X. Draft of Youth for Industrial Training

This measure was introduced by the Edict of the Presidium of the Supreme Council Concerning the State Labor Reserves of the U.S.S.R., of October 2, 1940.[133]

Prior to this edict, the soviet government had tried since 1933 to organize the recruiting of farmers for industry. Several decrees were issued which, on the one hand, established certain advantages for farmers who signed contracts with government agencies for work in certain industries, but, on the other hand, threatened with disadvantages those farmers who joined industry without making such formal contracts.[134] Regions were distributed among the governmental recruiting agen-

[130] See *supra*, p. 204.

[131] Vedomosti 1940, No. 42; Labor Legislation (1947) 29.

[132] U.S.S.R. Laws 1941, texts 61 (payment), 66 (merchant marine employees), 105 (various professions), 106 (railroad employees), 188 (merchant marine), 213 (telephone, telegraph, and radio employees), 220 (electricians), 272 (rivercraft employees), 295 and 298 (various professions); *id.* 1943, texts 193, 250; Edict of January 30, 1943, Concerning Medical Workers, Vedomosti 1943, No. 5.

[133] Vedomosti, October 9, 1940, No. 37.

[134] U.S.S.R. Laws 1933, text 116; *id.* 1938, text 15; see also Chapter 20.

cies.[135] Standard contracts for various industries were promulgated.[136]

The Edict of October 2, 1940, authorized the Council of People's Commissars to draft annually from 800,000 to 1,000,000 youths of from 14 to 17 years of age. Those from 14 to 15 years of age were assigned to two years' training in trade schools and railroad schools to become skilled laborers. Those from 16 to 17 years of age were assigned to six months' training in factory schools to become "mass workers," as the law termed it, in the coal, mining, metal, and building industries. By the Edict of the Presidium of June 19, 1947,[137] the draft age was changed, and it was made clear that youths of both sexes are subject to the draft. Under the edict, for training in the vocational and railroad service school, boys from 14 to 17 years of age and girls from 15 to 16 years of age may be drafted. For training in schools of industrial training, boys and girls from 16 to 18 years of age, and for underground work in coal and mining industries as well as for smelters, foundries, welding, and drilling in metallurgy and oil industries, boys up to 19 years of age may be drafted.

After graduation the labor draftees are obliged to work for four years in governmental factories, plants, mines, et cetera, assigned by the Central Labor Reserve Board, which was transformed into a Ministry in 1946. The draftees are paid regular wages, equal to those of other workers. Until the expiration of their term of obligation, labor draftees are deferred from military service.

[135] *Id.* 1938, text 208; id. 1939, text 397.

[136] For contracts for coal mines, peat, lumbering, and construction enterprises, see U.S.S.R. Laws 1938, text 298; for sugar refineries, *id.* 1939, text 221.

[137] Vedomosti 1947, No. 21.

The number of young men to be drafted from the cities is determined by quotas established for each year. From the collective farms (the rural population), two young men for each 100 men and women between the ages of 14 and 55 are drafted. Such drafts of 600,000 were ordered in November, 1940,[138] and in June, 1941.[139] Leaving the schools without authorization, and other violations of discipline are subject to penalties of up to one year's confinement in a reformatory.[140]

XI. Draft of Labor During the War

Simultaneously with the outbreak of the war on June 22, 1941, the Edict of the Presidium of the Supreme Soviet on Martial Law was promulgated.[141] On the basis of this edict, martial law was declared in the principal districts of Russia. Sections 2 and 3 of the edict provide that in localities under martial law the military authorities (military councils or high command of military units) may draft populations for labor duty to combat war emergencies of any kind. By the Edict of December 26, 1941, all employees, of both sexes, of war industries and branches of industries co-operating with war industries were declared mobilized (called to colors) and assigned to work at the place of their employment.[142] Any such employee who leaves his place of employment without authorization is subject to imprisonment for a period of from five to eight years.

A mobilization of able-bodied urban population (men from sixteen to fifty-five and women from sixteen to

[138] For details of the drafts, see U.S.S.R. Laws 1940, texts 602, 603, 604, and 673. Labor Legislation (1947) 11.
[139] Izvestiia, June 5, 1941.
[140] Edict of December 28, 1940, Vedomosti 1941, No. 1.
[141] Vedomosti 1941, No. 29. For translation see Vol. II, No. 39.
[142] Vedomosti 1942, No. 2. For translation see Vol. II, No. 42.

fifty years of age) for work at the place of residence "in industries and construction projects, primarily in the aviation and tank industry, in armament and munitions industries, and in the metallurgical, chemical, and fuel industries" was announced.[143] But special decrees provided also for the assignment of persons so drafted for work outside their residence, in which case special compensation was paid.[144]

A similar Decree of the Council of People's Commissars of April 13, 1942, provided for mobilization of the able-bodied urban population and high school students for seasonal work in collective farms, government farms, and the machine-tractor stations,[145] and the Council of People's Commissars provided for a labor draft of invalids by the Decree of August 28, 1942.[146]

All railroads were declared to be under martial law by the Edict of April 15, 1943, and their employees placed under the same responsibility as servicemen of the armed forces.[147] This was also extended to merchant marine and river craft plying inland waters, by the Edict of May 9, 1943.[148]

Employees of government establishments and offices located in districts near the front were declared mobilized. Unauthorized leaving of the place of employment was made to entail imprisonment for from five to eight years. All such employees were subject to compulsory evacuation, and managers were liable to imprisonment for a period of from five to ten years in the event of

143 Vedomosti 1942, No. 6. For translation see Vol. II, No. 43.
144 Labor Legislation (1947) 12; U.S.S.R. Laws 1943, text 209.
145 U.S.S.R. Laws 1942, text 60; also decree in Pravda, July 20, 1944.
146 Labor Legislation: Reference Book (in Russian 1944) 7.
147 Edict of April 15, 1943, Vedomosti 1943, No. 15.
148 Vedomosti 1943, No. 18.

"failure to secure organized and complete evacuation." All such cases were placed within the jurisdiction of military tribunals.[149]

XII. Employment of Disabled Veterans

Prior to 1942 the co-operatives of invalids (disabled veterans) were considered the main place for employment of the disabled veterans of World War II and other handicapped persons. On May 6, 1942, special committees were created in every region to take care of the employment of disabled veterans and the managers of outright governmental businesses and offices were directed to employ such veterans "taking into consideration the particular circumstances of each case." [150] From various laws and regulations the following employment procedure of disabled veterans may be outlined.

Not later than five days before release from the hospital the disabled veterans of World War II must undergo examination, at the same hospital, by a special Medical Labor Expert Board (V.T.E.K.). This board classes disabled veterans in one of three groups. Group I embraces persons who have completely lost their ability to work and need to be taken care of by other persons. Group II comprises persons who have completely lost the ability to work in a trade (their own or any other trade) but do not need to be taken care of by other persons. Group III comprises persons who are not able to work systematically in their profession under usual conditions but can employ their remaining working ability for a regular job, for working short hours and under easier conditions, or for working in another trade of

[149] Edict of September 29, 1942, Vedomosti 1942, No. 38.
[150] U.S.S.R. Laws 1942, text 76.

lower qualification. The board not only classifies each disabled veteran in one of these three groups but also determines the profession in which he should be trained.

Within two days after release from the hospital, the local agency of Social Security is required to assign the disabled veteran to some establishment, taking into consideration the findings of the Medical Labor Expert Board.[151] Healthy people may be transferred from an easy job to a harder job in order to make vacancies for disabled veterans. In the co-operatives of disabled veterans, healthy people may be ejected in order to admit to membership invalids of World War II. More detailed regulations have been issued in individual regions.

Invalids of Group III must be offered an assignment within three months after their release from the hospital. It is not only the right of an invalid in this group to take employment but rather his duty, although he does not necessarily have to take it at the assigned place. If such an invalid evades employment for two months from the date when suitable employment was offered to him, he is deprived of his pension and certain privileges in obtaining food.[152]

151 Aleksandrov, *op. cit.*, note 10 at 153; Astrakhan and others, Benefits, Aid and Pensions (in Russian 1944) 106.

152 Labor Legislation (in Russian 1944) 188; Astrakhan, *op. cit.*, at 106; Mashukov, Aids, Pensions and Benefits of Servicemen (in Russian 1944) 52.

Chapter 23

Courts and Civil Procedure

I. Courts

All the courts of the Soviet Union constitute one single judicial system, the organization of the courts and their jurisdiction being defined by federal statute.[1] There is only one court called "federal," the Supreme Court of the Soviet Union—the U.S.S.R. Supreme Court. All the courts below are called state courts, but they enforce equally the state and federal laws and are in all respects subordinate to the U.S.S.R. Supreme Court.

Justice in criminal cases is administered by the general courts that also try civil cases, by special courts, viz., military tribunals, courts for crimes committed by officials of railways and water transport lines, and camp courts, and by the Ministry of (prior to 1946 People's Commissariat for) the Interior. During the war, the special railway and water transport courts were abolished, and cases under their jurisdiction were assigned to military tribunals. The U.S.S.R. Supreme Court has supervision over the general and special courts but not over the Ministry of the Interior.

Civil cases are tried by the general courts, but a large category of disputes arising between governmental enterprises are assigned to special arbitral tribunals.[2]

[1] Judiciary Act of August 16, 1938. See Vol. II, No. 36, also Chapter 7.
[2] See *infra* II, 13.

Moreover, several other categories of civil disputes are exempt from the jurisdiction of the courts and assigned to the administrative authorities. It is rather difficult to list all these categories because, as the soviet textbooks state, at various stages of the soviet regime "the problem of exemption from the jurisdiction of the court of one or another group of disputes over personal private rights or property rights has been decided in various ways."[3] At the present time these textbooks indicate the following civil disputes as being assigned to administrative authorities, with the reservation, however, that the enumeration is not conclusive but merely states the most common disputes in this category. Thus, the administrative authorities determine all disputes involving the tenure of agricultural land (assignment of tracts of land and withdrawal of right to use the land), membership in a collective farm, including expulsion from collective farms, and the like.[4] The same also is true of disputes over dismissals of executives of certain categories; the application of disciplinary codes enacted for employees in certain branches of industry; refusal of management to allow transfer of employees;[5] eviction from certain categories of housing and some other disputes over housing;[6] and some matters related to domestic relations (giving names to children if the parents use different names, appeals from acts of guardians, et cetera).[7]

[3] Kleinman, editor, Civil Procedure (in Russian 1940) 90–92; Abramov, Civil Procedure (in Russian 1946) 46.

[4] Kleinman, *op. cit.* 91–92; Abramov, *op. cit.* 47. See also Vol. I, Chapters 20, 21. Vol. II, No. 30, Section 8.

[5] Kleinman, *id.*; Abramov, *id.* See also Chapter 22.

[6] See Chapter 13, II, also U.S.S.R. Laws 1937, text 314, translated in Vol. II, No. 2. Civil Code, comment 2 to Section 179.

[7] Kleinman, *op. cit.* 92; Abramov, *op. cit.* 49.

1. General Courts

The lowest general courts are the people's courts. Several of these courts are established in each district (rayon), a territorial subdivision corresponding to a county. They are courts of original jurisdiction for minor criminal cases and a large number of civil cases.[8] People's courts consist of judges elected by the constituency of the county for a period of three years.[9] Judges may be recalled by their constituents before the expiration of their terms.[10] The recall of a soviet judge is different from impeachment in American law; it is simply dismissal from office by a vote of the electoral body withdrawing the trust from the elected officer. The majority of cases are tried in the court before a bench consisting of a people's judge and two people's assessors.

People's assessors are elected in the same manner as the judges, but each assessor is called to serve for only ten days annually.[11] The difference between a judge and an assessor in soviet law does not correspond to the difference between a judge and a juror. A judge and two assessors constitute one trial bench and decide all questions jointly by a majority vote, both questions of law and of fact. The soviet judge is a professional judge in the sense that judgeship during the term of his office is the full-time job for which he is paid. But he is not necessarily trained in law. Neither is such training required of him by statute, nor do the majority of soviet

[8] Judiciary Act of 1938, Section 21; Code of Civil Procedure, Section 21. See Vol. II, Nos. 36, 44. There are also so-called comrade courts in industrial establishments, villages, and apartment houses, but they do not have any mandatory jurisdiction in civil disputes according to soviet writers. Kleinman, *op. cit.* 102–103. See also Vol. II, No. 44, comment to Section 21.

[9] Judiciary Act of 1938, Sections 22, 23.

[10] *Id.*, Section 17.

[11] *Id.*, Section 12.

judges possess such qualifications (see Chapter 7, I, 3). In contrast to this, the people's assessor serves in his judicial capacity for only ten days a year and does not receive any special salary. He is not chosen by lot from a large number of people, as is a juror, but, like a judge, he is elected by the constituency and then serves in the order of his appearance on the list of those elected. While on duty, he has the same rights and duties as the judge. The closest prototype of the soviet people's assessor is the German *Schöffe* or lay judge. The Russian word *zassedatel* is nothing more than the Russian translation of the Latin *assessor,* for which reason this term is used in the translation in spite of possible ambiguity.

Although the Judiciary Act of 1938 provides for direct election of people's judges and assessors by the constituency, no such elections have taken place thus far. It seems that the procedure provided for in the previous Judiciary Act is still used and the electing is done by the local soviets.

The people's court tries all civil cases involving disputes between private parties, disputes between collective farms, and disputes between holders of concessions or foreign firms and government agencies involving not more than 10,000 rubles.[12] Its jurisdiction with regard to disputes between government agencies is more limited.[13]

The next higher courts are not uniform in the whole of the Soviet Union, because they correspond to the variety of administrative subdivisions above the districts. In the R.S.F.S.R. and other larger constituent republics where the districts (rayon) are combined into

[12] Code of Civil Procedure, Section 21, Vol. II, No. 44.
[13] See comment 3 to Section 22 of the Code of Civil Procedure.

regions, provinces, national districts, and autonomous republics, there are courts corresponding to these territorial divisions and above them the supreme courts of the constituent republics, such as the R.S.F.S.R., the Ukrainian and the Byelorussian supreme courts. In other smaller constituent republics which are not subdivided into regions and provinces, the supreme courts of such constituent republics are the next higher courts above the people's courts.[14] Judges and assessors for all these courts are elected for a period of five years by the highest governmental body of the given territory: the supreme soviet of a constituent and autonomous republic or the regional or provincial soviet.[15] The judges may be recalled during their term of office by the soviet which elects them.[16]

In the R.S.F.S.R. and the constituent republics which have a similar structure, the provincial and regional courts and the courts of the autonomous republics function as courts of original jurisdiction in the more important criminal cases, and in all civil cases which are beyond the jurisdiction of the people's courts. Such cases are heard before a judge and two people's assessors elected in the same manner as judges. Provincial and similar courts function also as appellate courts for cases decided by the people's courts. Appellate cases are heard before a bench of three judges. Their decisions when acting as an appellate court are final.[17] In the R.S.F.S.R., the Supreme Court functions in civil cases exclusively as an appellate court, reviewing cases de-

[14] Kleinman, *op. cit. supra,* note 3 at 94, 95; Abramov, *op. cit. supra,* note 3 at 49.

[15] Judiciary Act of 1938, Sections 30, 38, 45.

[16] *Id.,* Section 17.

[17] Judiciary Act of 1938, Sections 30–44; Code of Civil Procedure, Sections 22, 255.

cided by the provincial and regional courts and supreme courts of autonomous republics as courts of original jurisdiction. Any supreme court may, however, assume the jurisdiction in a case triable by any lower court and thereby become a court of original jurisdiction.[18]

In some other republics, the supreme courts also try certain specified categories of cases as courts of original jurisdiction (e.g., actions against central government departments). In republics where there are no regional or provincial courts, the supreme courts exercise the jurisdiction of these courts.[19] The decisions of the supreme courts of the constituent republics are final. However, a case may be brought before the U.S.S.R. Supreme Court upon protest of the U.S.S.R. Attorney General, the attorney general of a republic, or the President of the Supreme Court.[20]

2. Special Courts: Courts-Martial and Others

An outstanding characteristic of the soviet court-martial system is that at the top it links with the civilian judicial system and that certain crimes commited by civilians, such as treason, espionage, subversive activities, are tried under normal peacetime conditions by the military tribunals.[21] On the other hand, in peacetime, in localities which are not under martial law, only certain categories of crimes committed by men in the serv-

[18] Code of Civil Procedure, Section 24.

[19] Kleinman, *op. cit. supra,* note 3 at 94, 95; Abramov, *op. cit. supra,* note 3 at 49.

[20] The Judiciary Act of 1938 provides also for the possibility of appeal by a private party, but the procedural codes do not offer any remedy of which a private party may avail himself in order to bring his case before the U.S.S.R. Supreme Court.

[21] U.S.S.R. Laws 1934, text 284, Section 7; *id.,* text 283, Art. I, Section 2: Treason, espionage, terrorism, explosions, incendiarism, and other kinds of subversive activities. (Sections 6, 8, 9 of the Statute on Crimes Against the State).

ice were tried by the military tribunals. Others were assigned to the jurisdiction of the civilian courts. However, the Edict of December 13, 1940, placed all crimes committed by men in the service under the jurisdiction of the military tribunals. This was extended in the Edict of June 22, 1941, to localities under martial law.

Unlike courts-martial in other countries, military tribunals appear to be permanently functioning bodies, independent of the commanders of the units to which they are attached.[22] In the localities under martial law, the military tribunals are composed of permanently detailed professional military judges of officer rank. In other localities, they consist of one professional military judge and two people's assessors from among those persons elected by the local government. The commanders of the units are neither reviewing nor appointing authorities in regard to the military tribunals. These tribunals form a separate hierarchy.

The right of appeal is in many instances restricted and, in localities under martial law, is excluded altogether. On the other hand, final and legally binding sentences may be reviewed ex officio by higher tribunals on the motion of certain military judicial officers (Statute of 1941, Sections 14, 15).

General direction of the activities of the military tribunals belongs to the U.S.S.R. Supreme Court, and immediate direction is exercised by its courts-martial division.

The railways and water transport line courts have

[22] Statute on Military Tribunals of 1926, Section 1:
The general direction of the activities of the military tribunals belongs to the federal Supreme Court of the Soviet Union. The immediate direction of the activities and the administration of the military tribunals is performed by the Court-Martial Division of the federal Supreme Court.
Also, Statute on Military Tribunals of 1941, Sections 3 and 4, see Vol. II, No. 38.

jurisdiction analogous to that of the military tribunals over crimes endangering the safety and proper functioning of transportation.[23]

The postwar court decisions and textbooks also mention camp courts among the special courts. It was reported without more details that they were created by the Edict of the federal Presidium of December 30, 1944, for trial of crimes committed in the camps of correctional labor and in penal colonies of the Ministry of the Interior. However, crimes committed by the employees of this Ministry who have military ranks are triable by the courts martial. The text of the edict has not been disclosed in any publication.

3. U.S.S.R. Supreme Court

The U.S.S.R. Supreme Court as originally established under the 1922 Constitution was in the nature of a consultative body to the Central Executive Committee, then the supreme governing body of the Union. The Supreme Court was authorized to give "authoritative interpretations to the supreme courts of the constituent republics on questions relating to federal legislation," and to adjudicate legal disputes (there have been none) between constituent republics, but it had no authority to reverse the decisions of the supreme courts of the republics. It could review such decisions on the motion of the Attorney General but had to submit its opinion to the Central Executive Committee. The Supreme Court could also give opinions to the same committee, if asked, on the constitutionality of the enactments of the repub-

[23] R.S.F.S.R. Code of Criminal Procedure, Section 28; Judiciary Act of 1938, Section 60.

[24] Evtikhiev and Vlasov, Administrative Law (in Russian 1946) 259. See also Decision of the U.S.S.R. Supreme Court, undated, reported in (1947) Socialist Legality No. 6, 20; Golunsky, The Judiciary (in Russian 1947) 117.

lics. However, in 1935, the U.S.S.R. Supreme Court was granted the power to quash the decisions of the supreme courts of the republics, but only by reason of "contravention of federal legislation or interference with the interests of other republics."[25] But the 1936 Constitution and the Judiciary Act of 1938 have granted the U.S.S.R. Supreme Court, among other things, the power to "superintend the administration of justice by all the judicial bodies of the U.S.S.R. and constituent republics by means of the examination of protests filed by the U.S.S.R. Attorney General and the President of the U.S.S.R. Supreme Court against such judgments and orders in criminal and civil cases as have become final" (Judiciary Act, Section 64).

Consequently, the U.S.S.R. Supreme Court is at present the highest tribunal, superintending all the general and special courts mentioned above. It consists of 68 justices and 25 assessors elected by the U.S.S.R. Supreme Soviet for a term of five years.[26] The U.S.S.R. Supreme Court has civil and criminal divisions, a railway and waterway division, and a courts-martial division. Except in a limited category of cases of high treason triable by its courts-martial division, the Supreme Court functions as an appellate court of a special type. A private party may not bring an appeal before the U.S.S.R. Supreme Court. This right is reserved only for the Attorney General and the President of that court (see *infra,* Chapter 24, II).

[25] U.S.S.R. Laws 1935, text 68, Section 1. For previous provisions of the U.S.S.R. Constitution, see Chapter 7, note 89. The initial step toward extension of the jurisdiction of the U.S.S.R. Supreme Court was taken by the Act of July 10, 1934, ordering the establishment of a "supervisory trial bench" within this court for the review of protests against the decisions of the supreme courts of the soviet republics and of the individual benches of the federal Supreme Court. U.S.S.R. Laws 1934, text 284, Art. II.

[26] U.S.S.R. Constitution, Section 105; Judiciary Act of 1938, Sections 63 *et seq.*

In addition, a Plenary Session of all the justices may issue directives to the inferior courts on matters of administration of justice. Although under the Constitution the right to interpret the laws is reserved to the Presidium of the Supreme Soviet, such directives issued by the U.S.S.R. Supreme Court are very close to what may be described as authoritative judicial interpretation of the statutes.[27]

4. Administrative Authorities with Penal Power

The agencies of the Ministry of the Interior and Ministry of Security (prior to 1946 People's Commissariat for the Interior—*Narkomvnudel*) function as authorities for investigation and imposition of punishment. Under the Statutes of July 10, 1934, after an investigation is completed, the Ministry may turn the matter over to an ordinary or military court, or impose in a nonjudicial procedure the penalty of imprisonment in a convict labor camp for up to five years, exile with settlement in a certain locality for a period of up to five years, or banishment from the Soviet Union.[28] The

[27] U.S.S.R. Constitution 1936, Section 49; Judiciary Act of 1938, Section 75. See Chapter 7, II.

[28] Act Concerning the Formation of a Federal People's Commissariat for the Interior of July 10, 1934 (excerpts) (U.S.S.R. Laws 1934, texts 283 and 284).

2. The People's Commissariat for the Interior shall be charged with the following duties:

(a) Protection of the revolutionary order and state security;
(b) Protection of public (socialist) property;
(c) Recording of the acts affecting civil status (recording of births, deaths, marriages, and divorces);
(d) Frontier security.

. . .

8. A special board (*osoboe soveshanie*) shall be organized and attached to the U.S.S.R. People's Commissariat for the Interior, subject to regulation by a separate statute, and shall be granted the right to apply in an administrative procedure banishment from certain localities, banishment with settlement in a locality, confinement in a correctional labor camp up to five years, and deportation abroad.

The board mentioned in Section 8 above consists of the U.S.S.R. Minister

courts may not intervene in the imposition of these punishments by the Ministry of the Interior, which is not bound by any specific rules of procedure (for more details see Chapter 7, I, 1).

5. Government Attorneys

Parallel to the hierarchy of courts, there exists a hierarchy of government attorneys. The federal Attorney General, independent of the Minister of Justice, is elected by the Supreme Soviet for seven years, and he appoints all the attorneys for the republics, regions, and provinces and approves the appointment of the district attorneys. The Attorney General is vested with "supreme supervisory power over the strict execution of the laws by all Ministries and their agencies, all public officials, and citizens." [29] The local government attorneys "perform their functions independently of any local authorities, being subordinate solely to the U.S.S.R. Attorney General." [30] Thus all the government attorneys constitute a single federal apparatus, which, with the U.S.S.R. Attorney General at the head, is assigned the task of the many-sided supervision over law enforcement. Approval by a government attorney is sufficient, under the soviet Constitution, for arrest in lieu of a court warrant.[31]

The soviet theorists distinguish two main aspects in

(prior to 1946, People's Commissar) of the Interior, his deputies, the Chief of the Central Bureau of Police and the minister (people's commissar) of the interior of the republic concerned. See U.S.S.R. Laws 1935, text 84, Section 5; Studenikin, The Soviet Administrative Law (1945) 105; Evtikhiev, Administrative Law (in Russian 1946) 191, 244. In the R.S.F.S.R., there is no ministry of the interior and its duties are discharged by the federal ministry. Studenikin, *id.* History of the Ministry of the Interior is discussed in Chapter 7, I, 1.

[29] U.S.S.R. Constitution, Section 113.

[30] *Id.*, Section 117.

[31] *Id.*, Section 127.

the multifarious responsibilities of a government attorney.[32] One is what is called the supervisory power over the administration of justice. In the exercise of this power, the government attorneys function as public prosecutors in criminal cases and may enter any civil suit at any stage. They may also lodge appeals and move for an ex officio reopening of a case in which the court has rendered a final decision (see Chapter 24, II). Any appellate court must hear the opinion of a competent government attorney before the rendition of a decision on appeal. In a way, the government attorneys have more power than the courts because they may supervise, at least on the face of statutory provisions, the activities of the Ministry of the Interior, which the court may not.[33]

In addition, the government attorneys exercise what is called "general supervisory power." They function in this capacity as the "eye" of the central government, closely watching the observance of law by the administration, in particular by the local authorities. In this capacity, they participate in the sessions of local soviets, and although they do not vote, they may take part in the deliberations. They may examine any resolution of the administrative authorities, and copies of many resolutions are communicated to them. The government attorney has the right to make a motion, called protest, against the resolutions of the local soviets of his district or region, if he deems such to be against the law, even in instances not involving a punishable act. These protests are filed with the next higher authority, e.g., a protest against a resolution of a minister is filed with the Council of Ministers, a protest against an act of a

[32] E.g., Evtikhiev, *op. cit.*, note 28 at 112 *et seq.*
[33] *Id.* 113.

regional officer is filed with the similar officer of a constituent republic. But the protest against ordinances of executive committees of the local soviets are filed with the executive committee which has issued the ordinance. If the committee fails to reconsider the ordinance within a statutory period of time which varies according to republics, the ordinance is suspended.[34] Since the soviet government agencies run the whole of the economy of the country, the government attorneys are frequently called upon to check the efficiency of pure economic operations. As an example of such pushing of the responsibilities of a government attorney to the extreme, one may refer to a directive by the Azerbaijan Attorney General, issued in connection with the sowing campaign in 1933. The district attorneys had been directed to report "whether they checked the condition of dirt lanes, bridges, and the irrigation system, the receipt of mineral fertilizers by the state farms, the clearing of bushes from the cotton plantations, the accomplishment of plowing, the condition of the rotation of the sowing, and the adequacy of the stock of containers for the supply of fuel for the tractor columns." [35]

From the above outline, it is evident that the wide responsibilities of soviet government attorneys appear quite different from those of public prosecutors in Anglo-American law, for which reason this term has not been used in the translation of the Russian terms *prokuror* (individual attorney) or *prokuratura* (government attorneys as a body). The duties of soviet government attorneys are also different from their Western prototype—French *parquet* (*ministère public*)

[34] *Id.* 114, 115.
[35] (1933) Socialist Legality No. 8, 9.

and German *Staatsanwalt*.[36] They have, however, much in common with those of the prerevolutionary Russian provincial attorneys as they existed before the Judicial Reform of 1864 when courts were not separated from the administration. The provincial attorneys were the main instrument by which the central absolutist government sought to check the irregularities and abuses of the local administration and courts. Their supervisory duties were as broad as those of the soviet attorneys.[37] But when the entire judicial system of imperial Russia was reformed in 1864 with the idea of creating a judiciary independent from the administration, and when other liberal reforms followed, the provincial attorneys were abolished. The government attorneys attached to various courts were generally confined to the duties of prosecution of crimes in court and to a great extent relieved from the supervision of administration. Although they continued to be ex officio members of various administrative boards, they had no power to interfere with the administration.

At the beginning of the soviet regime, government attorneys were abolished together with the prerevolutionary courts.[38] Soviet government attorneys were first introduced in the R.S.F.S.R. on May 28, 1922,[39] and later in other individual soviet states (republics). They were appointed by the commissars for justice of the individual republics in their capacity as attorneys

[36] For a description in English see Ensor, Courts and Judges in France, Germany and England (1933); Burdick, Bench and Bar of Other Lands (1939).

[37] "General Statute on Provincial Administration," Section 2474, Svod Zakonov (Code of Laws) 1857 ed., Vol. II, Part 1. Foinitsky, 1 Course in Criminal Procedure (in Russian 4th ed. 1912) 522 *et seq.*

[38] Decree No. 1 on Courts, R.S.F.S.R. Laws 1917–1918, text 50. See also Chapter 7.

[39] *Id.* 1922, text 424.

general of such republics. The attorneys of individual republics were not linked with any federal office until 1933. Although in 1924 an attorney general was appointed for the U.S.S.R. Supreme Court, his duties and powers were rather indefinite. But the office of a federal Attorney General had been established on June 20, 1933, with more distinct power of supervision over all government attorneys.[40] Nevertheless, the attorneys general remained in a dual subordination both to the federal Attorney General and commissars for justice of individual republics, who were independent of the federal Attorney General. But on June 26, 1936, all government attorneys and the judge-investigators were exempted from any subordination to state authorities and were organized as a strict federal hierarchy as appears under the 1936 Constitution and as outlined above.[41] By the same act, a federal Commissariat for Justice was created totally apart from the federal Attorney General, and all courts were brought under this Commissariat. In 1946 the Commissariat for Justice was renamed, together with other commissariats, a Ministry.

Consequently, in its present form, the machinery of government attorneys in the Soviet Union is a comparatively young institution. The actual exercise of broad powers conferred upon government attorneys outside the duties of the prosecution of crimes, does not seem to be well crystallized. Pages written on this subject matter in the soviet law books fail to draw a distinct line between a proper exercise of "general supervisory powers" and undue interference with the

[40] U.S.S.R. Laws 1933, text 239; see also Act of December 17, 1933; *id.* 1934, text *2b*.

[41] *Id.* 1936, text 338.

activities of local authorities or the direct assumption of administrative functions. The development of this institution under the soviet regime towards the type of a provincial attorney of bygone days of absolutist Russia, and not towards government attorneys of constitutional Russia or similar offices in democratic countries, is significant. As did the autocratic emperors of Russia, the soviet rulers sincerely wish to check the abuses of local administrators and insure "the observance of law." However, while under a constitutional regime the remedy is sought in an independent judiciary and the combined result of public opinion, free press, and free elections, the soviet rulers rely, as the emperors did, upon a highly centralized bureaucratic machinery assigned to perform this task.

6. Notaries Public

Notaries in the Soviet Union are government agents appointed by the provincial office of the Ministry of Justice. Notaries keep public records in which all notarized contracts are entered, and certified copies thereof may be issued. They also perform a variety of other functions:[42] issue writs of execution by placing an execution clause on a number of documents specified by law, provided one year has not expired from the date of maturity;[43] take protective measures with regard

[42] The functions of notarial offices are regulated by the Law on Notarial Offices of July 20, 1930, R.S.F.S.R. Laws 1930, text 476 and Instruction of the R.S.F.S.R. Commissar for Justice Concerning Notarial Offices of November 17, 1939. See Notarial Offices (in Russian 1942) 26.

[43] R.S.F.S.R. Laws 1930, text 477, replaced by the Act of December 28, 1944, *id.* 1945, text 1, amended by the Act of March 17, 1946, *id.* 1946, text 24.

In the Byelorussian, Ukrainian, Azerbaijan, Uzbek, Tadjik, Armenian and Turcoman republics, such execution clauses were issued by people's courts until the Act of July 28, 1939, U.S.S.R. Laws 1939, text 381, which assigned this task to the notaries public.

to estates [44] and issue certificates attesting to succession rights; perform protests of negotiable instruments, and protests required under the maritime law; certify copies and signatures; [45] serve notices and certify that service has been performed; take depositions in suits pending or to be instituted; [46] declare absentees as dead; [47] register attachments and issue mortgage certificates on buildings and building tenancies; receive money and documents deposited in performance of an obligation or for safekeeping; translate documents.

7. Attorneys at Law

Decree No. 1 on Courts of November 24, 1917, opened the practice of law to "all honest persons of either sex who enjoy civil rights." In March, 1918, Decree No. 2 admitted to the practice of law for remuneration, only members of a special body of "legal representatives" embracing prosecutors and defense counsels, both appointed by the local soviets. But the Statute on Courts of November 30, 1918, put all members of this body on a straight monthly salary basis and ordered the fee for the attorneys' services to be collected by the State treasury.[48] The failure of this attempt to eliminate lawyers' fees was frankly admitted by Krylenko in January, 1922, in the following words:

[44] In the Byelorussian, Ukrainian and Uzbek republics this function is performed by people's courts. See Kleinman, *op. cit. supra,* note 3 at 314.

[45] A statement with a signature certified by a notary public as to the identity of the signer is the nearest approximation to an affidavit.

[46] Depositions are taken in the Byelorussian, Ukrainian, Uzbek, and Turcoman republics by the people's courts, see Kleinman, *op. cit. supra,* note 3 at 314.

[47] In the Byelorussian, Ukrainian, Azerbaijan, and Georgian republics the absentees are declared dead by the people's courts, *ibid.*

[48] R.S.F.S.R. Laws 1917–1918, text 50, Section 3; *id.*, text 347 (renumbered by mistake 420), Sections 24–27; *id.*, text 889, Sections 40–49.

The result of this experiment was that whenever a person threatened by a penalty appeared before the court and wished to make his defense attorney defend him in the best way, he offered the attorney a fee. To eliminate this is beyond our power; it would be necessary to remake human nature.[49]

A soviet writer also relates that:

In some instances the accused entered into agreement with both his defense counsel and the prosecutor, apparently to make the former defend him well and the latter to prosecute him leniently. All the members of the body of legal representatives in Leningrad except one were indicted. The governmentalized defense discredited itself and lost the confidence of the court.[50]

The next Statute on Courts of October 21, 1920, made another experiment. It left the decision to the discretion of the court whether a defense counsel should be admitted, and if so, allowed the court to draft counsel from a list of persons capable of performing such duties, such list to be prepared by the local soviet. Defense counsel was to be paid per diem from the treasury. In civil cases the parties could be represented only by next of kin.[51]

With the advent of the New Economic Policy, the establishment of courts and the enactment of codes of laws, the practice of law was regulated on May 26, 1922, more after the pattern of Decree No. 2 mentioned above. But the conditions of the exercise of the legal profession continued to change. The soviet government never assigned the giving of legal aid to a free self-governing profession and never lost its distrust of fixing lawyers' fees by agreement with clients. Nevertheless, some of these elements were admitted in one form or another. Thus, the selection of a lawyer by the client

49 Krylenko's speech at the 4th convention of the members of the soviet judiciary, quoted from Rivlin, Soviet Advocates (in Russian 1926) 21.

50 Rivlin, *ibid.*

51 Sections 43–49, R.S.F.S.R. Laws 1920, text 407.

and their mutual agreement as to fee were allowed or curtailed alternatively. The organization of lawyers—the *collegia*—was given sometimes more and sometimes less autonomy. The lawyers were forced to work collectively in groups—legal aid offices (*konsultatsiia*)—or permitted to practice law individually. In these offices the fees collected were pooled and at one time distributed equally and, at another time, apportioned with a view to recognizing the personal effort, qualifications, et cetera, of individual lawyers. The official title of the members of the legal profession was also subject to change, until the title of advocate, the colloquial Russian equivalent to attorney at law, was restored in 1939.

The position of a soviet lawyer since the new Statute on Advocates of August 16, 1939, has remained somewhat self-contradictory. On the one hand, the practice of law is regulated in terms suggesting an organization of a free profession. Thus, graduates from law schools or persons with experience in judicial work are admitted to membership in the bar (*collegium* of advocates) by a committee elected by the members of the profession. However, the federal Minister of Justice and those of the republics may overrule admissions. *Collegia* of advocates are established in regions and republics and are defined by the statute as voluntary associations of persons engaged in the exercise of the legal profession. Not only members of these bodies are allowed to practice law, but also persons to whom a special license is issued by the ministers of justice. Advocates do not receive any salaries from the government but are paid by their clients according to a schedule established by the federal Minister of Justice.[52] Advocates

[52] U.S.S.R. Laws 1939, text 394, Section 5. See also Instruction Determining the Remuneration for Legal Aid Rendered by Advocates to the

may not hold any position with the government except teaching positions and offices filled by election.

On the other hand, the lawyer's work is done largely through specially organized legal aid offices (*konsultatsiia*), under the supervision of an advocate appointed by the committee of the bar as director. He distributes cases among the members of the bureau and determines the fees according to a schedule established by the Minister of Justice.[53] A member of the *collegium* must appear in the office at certain hours and sign in. No statutory provision expressly permits or prohibits the practice of law outside such offices.

II. Civil Procedure: Trial

1. Prefatory

Soviet civil procedure is akin to that in other civil law countries. For a time, some soviet jurists looked upon it as a direct borrowing from capitalist law.[54] Since 1936, however, this view has been considered erroneous by the leading soviet authorities. They insist that the soviet civil procedure is socialist in nature because "its source is the dictatorship of the proletariat and its objective is to protect the socialist system of economy and the new socialist social relations which manifest the victory of socialism."[55] However, an institutional study of the technicalities of soviet civil procedure discloses a framework similar to that of any European country, and

Population, Approved by the U.S.S.R. People's Commissar for Justice, Order No. 85 of October 2, 1939, see Soviet Advocates (in Russian 1942) 11 *et seq.*

[53] *Lex cit.*, note 52, Section 22; Model Rules of Internal Labor, Order for Advocates, Approved by the U.S.S.R. People's Commissar for Justice on April 4, 1945, Section 7, see Soviet Advocates (in Russian 1942) 30.

[54] Civil Procedure Textbook (in Russian 1938) 8.

[55] *Ibid.* See also general purposes of administration of justice as outlined in the Judiciary Act of 1938, Sections 1–3, discussed in Chapter 7, also Kleinman, *op. cit. supra,* note 3 at 11 *et seq.*

there appear only individual points on which the soviet law is different. Nevertheless, the similarity in details is overbalanced by differences in the fundamental principles of the administration of justice and in the position of the soviet court. The soviet civil procedure is like a new building erected of old bricks. In this outline the attention of the reader is drawn primarily to these specific points of difference. Otherwise, the text of the Code of Civil Procedure is self-explanatory.

2. History

When the soviet regime came into being, civil procedure in Russia was regulated by a quite modern code enacted in 1864 and drafted after the pattern of the French Code. It was amended several times, the last important amendment being of 1912. Being a product of the liberal judicial reform of the 1860's, it was based upon the most advanced European doctrines of the time and was written in a most lucid language with a minimum of technical expressions. In line with the Continental European civil procedure, the jury did not participate in the trial of civil cases.

Prior to 1923, no soviet decree dealt specially with civil procedure. Some isolated provisions on the subject are to be found in the separate acts dealing with court organization and judicial procedure.[56] Originally

[56] Decrees on the Courts: No. 1 of November 24, 1917, No. 2 of February, 1918, and No. 3 of 1918, R.S.F.S.R. Laws 1917–1918, texts 50, 420 (347), 589; Instruction of the Commissar for Justice of July 23, 1918, Concerning the Organization and Functioning of the Local People's Courts, *id.*, text 589; Statutes on the People's Courts of the R.S.F.S.R. of November 30, 1918, *id.*, text 889, and of October 21, 1920, *id.* 1920, text 407; Statute on Supreme Judicial Review of March 10, 1921, *id.* 1921, text 97; Instruction on the same subject of September, 1921, and Provisional Instructions of January 4 and May 25, 1923, Concerning Basic Norms of Civil Procedure, *id.* 1923, text 107; Instruction of the Commissar for Justice of

the new courts were instructed to follow the imperial Code of Civil Procedure of 1864, insofar as it was not in contradiction with decrees of the soviet government, but finally any reference to the old laws was prohibited.[57]

The Code of Civil Procedure of the R.S.F.S.R. was enacted by the Second Session of the Tenth R.S.F.S.R. Central Executive Committee on July 7, 1923, and was put into effect on September 1, 1923, by the Resolution of July 10, 1923, of the same committee.[58] It has since been amended several times, but this Code has served as a pattern for similar codes of other soviet republics.

The federal Judiciary Act of 1938, regulating in a uniform way certain procedural questions with regard to all the courts of the Soviet Union, changed the provisions of the codes of civil procedure of the soviet republics indirectly. These changes are noted in the comment to individual sections.

The following are the most important points of the soviet civil procedure.

3. Filing of a Suit

Generally, proceedings in a civil case are commenced upon the filing of a written complaint (Section 75). In labor cases and in cases which are within the jurisdiction of the people's courts, the complaint may be declared to the people's judge orally and is reduced to writing by him or the secretary of the court. It must be read to the plaintiff and signed by him (Section 75). A similar procedure of instituting a civil action was provided in

1923, No. 104 (1923) Soviet Justice No. 21. See also Kleinman, *op. cit.*, note 3 at 27.

[57] See Chapters 5, I, 3 and 8, II, 2.

[58] R.S.F.S.R. Laws 1923, text 478. For translation see Vol. II, No. 44.

the imperial statutes for cases triable by lower courts. The complaint must recite the names and addresses of the parties, the name of the plaintiff's attorney if he files the complaint, the statement of facts upon which the claim is based, proofs substantiating the claim, and the prayer for relief (Section 76). Claims for damages caused by a criminal act may, at the election of the injured party, be presented either in the course of the proceedings in the criminal case (Section 10) or separately as a complaint under the rules of civil procedure (see Volume II, No. 44, comment to Section 10).

A superior soviet court may change the venue of a case. It may remove a case from one lower court under its jurisdiction and refer it for trial to another court of the same rank (Section 32). The Supreme Court may also remove any case from any court and proceed in its stead, or refer to any provincial court any case or category of cases (Section 24).

No conflict of jurisdiction between the courts is permitted (Sections 33, 33*a*). Thus, if a court refuses to take cognizance of a case because it is within the jurisdiction of another court, the latter is bound by such decision.

4. Power of the Court in General

A litigant in a soviet court in certain respects has considerable freedom of action. Amendment of the cause of action and addition to or subtraction from the prayer for relief are permitted at any stage of the proceedings (Section 2). On the other hand, the court appears to be more the master of the case (*dominus litis*) than the litigants. The court may adjudicate in excess of the prayer for relief unless the amount of the claim is de-

termined by contract or by rule of law (Section 179). Furthermore, the court on its own motion may order the presentation of evidence not offered by a party (Sections 118, 121), of a document in particular (Section 140).

The power of the soviet court to order the presentation of evidence on its own initiative, striking as it is, nevertheless represents a certain modern tendency in civil procedure, though undoubtedly carried to an extreme. Such power of a criminal court is generally recognized in Europe. However, in the trial of civil cases, two maxims gained general recognition in the nineteenth century. The first was *judex ne procedat ex officio* (a civil judge should not act on his own initiative); and accordingly, his attitude toward the proceedings was defined by the principle, *da mihi factum dabo tibi jus* (i.e., framing of the facts was left to the litigants, while the role of the judge was restricted to the mere application of law). Thus, the imperial Russian Code of Civil Procedure stated: "The court shall in no case collect evidence or information itself but shall base its decisions exclusively upon evidence presented by the parties."[59] The court was, however, authorized to draw the attention of the parties to the dearth of evidence in support of a material circumstance and to offer them an opportunity to fill this gap.[60] In contrast to this, the old Prussian doctrine of judicial investigation, stated in the Prussian Judicial Ordinance of 1793, has been revived in the twentieth century and has found its way into the Austrian Code of 1895, the Hungarian Code of 1911, the Polish Code of 1932, and the Yugoslavian Code of 1930. Under these codes, a civil court may order the presentation of evidence not offered by the parties, provided the

[59] Imperial Code of Civil Procedure of 1864, Sections 367 and 82.
[60] *Id.*, Section 368.

court acquired knowledge of its existence from the record or from the pleadings of the parties, whether written or oral.[61] Presentation of testimony and documents may not be ordered, however, against the protest of both parties.[62]

In contrast to these provisions, the soviet Code assigns an active role to the civil court and grants the court unrestricted power to order the submission of evidence. The court is not confined to pleadings and material submitted by the litigants, but must, by interrogation of the parties, see to it that all the essential facts of the case are clarified and supported by evidence (Section 5). The court decides in its own discretion whether to accept the renunciation by a litigant of his rights or of their defense in court (Section 2). Therefore, the court is not bound by the acknowledgment of a debt and the like.[63] All this shows what a hazard a litigant runs in the soviet civil court. As soon as he sets the proceedings in motion, they are no longer under his control. As mentioned above, the court may in certain instances even adjudicate in excess of the claim.

It is significant that the Code of Civil Procedure does not mention the possibility of termination of a litigation by composition. Not until 1928, did the R.S.F.S.R. Supreme Court rule that composition is allowed at any stage of the proceedings, "provided," said the court, "that the composition does not escape the supervision of the court and is verified by it." [64]

[61] Austrian Code, Sections 182, 183, 371; Yugoslavian Code, Section 247, par. 1, 4, Sections 464, 467; Polish Code, Section 226.
[62] Yugoslavian Code, Section 247; Polish Code, Sections 266, 282.
[63] Kleinman, editor, Civil Procedure (in Russian 1940) 151.
[64] *Id.* 206; Code of Civil Procedure (in Russian 1938) 145.

5. Evidence

The court is not bound by any rules governing admission or the weighing of evidence. Each party must prove the facts upon which he relies as the basis of his claim or defense (Section 118). Evidence is submitted by the parties and may also be collected on the initiative of the court. If the evidence submitted is inadequate, the court may request the parties to submit additional proof (Section 118). The admission of any item of evidence submitted by a party depends upon whether the court finds it relevant to the case (Section 119). The determination of whether a certain circumstance shall be considered self-evident rests with the court (Section 120). The court may order a litigant to present his pleading in person, even if he is represented by an attorney (Section 99). In such instance, the litigant is not considered to be a witness.[65] New evidence may be submitted by the litigants after the beginning of the hearing provided the reason for delay is deemed justifiable by the court (Section 106). The evidence in a soviet court may consist of: testimony of witnesses (Sections 121, 128–139, 150, 251); written evidence (Sections 140–151); expert testimony (Sections 152–159); view of the premises or examination of objects (Sections 160–162); and declarations of litigants (Section 99) including admissions (confession).

With regard to the evaluation of evidence, the soviet Code of Civil Procedure does not contain any provision, but it is held by the soviet jurists [66] that the provision of Section 23 of the Basic Principles of the Criminal Pro-

[65] R.S.F.S.R. Supreme Court, Plenary Session, Protocol Ruling No. 6 of March 5, 1928, Code of Civil Procedure (1943) 149–150. See also Abramov, Civil Procedure (in Russian 1946) 117.

[66] *Id.* 147.

cedure of the U.S.S.R. and Constituent Republics of 1924 applies to the civil courts. It reads:

23. The court shall render its judgment on the ground of the data in the case examined at the hearing. Evaluation of the evidence in the case shall be made by the judges according to their inner conviction based upon consideration of all circumstances of the case in their entirety.[67]

6. Witnesses

Testimony of witnesses is admitted in evidence in all instances except where written evidence is required by law (Section 128). No one may refuse to testify as a witness in court, unless communication of the information required divulges a state or service secret (Section 129). Such information is specified in the statutes on protection of state and service secrets.[68] Professional secrecy is not an excuse for refusal of testimony except by the counsel in the case with regard to his client.[69] A witness who, being summoned, fails to appear may be fined and brought to court forcibly, if he fails to appear on a second summons (Section 49). A witness who re-

[67] U.S.S.R. Laws 1924, text 206. This section may be well compared with the provisions of the Yugoslavian and Polish Codes of Civil Procedure expressing the recent Continental doctrine of evaluation of evidence. The Polish Code carries the following provisions identical with those of the Yugoslavian Code.

250. The judge shall evaluate the reliability and force of evidence according to his own conviction based upon a comprehensive consideration of the entire material collected in the case.

The judge shall evaluate in the same manner the significance of a refusal by a party to present evidence or of making obstacles to the production of proof contrary to the disposition of the court.

See also Gsovski, New Codes in the New Slavic Countries (1934) 193 *ff.* On the soviet theory of evidence, see Vyshinsky, Theory of Evidence in Court Under the Soviet Law (in Russian 1941; 2d ed. 1946). For his discussion of the Anglo-American doctrine, see page 76 *et seq.*

[68] U.S.S.R. Laws 1925, text 390; *id.* 1926, text 213. These acts were replaced by the Resolutions of the Council of Ministers of June 8, 1947. See Vol. II, No. 51.

[69] Kleinman, *op. cit.*, note 63 at 155. See also Section 61 of the R.S.F.S.R. Code of Criminal Procedure.

fuses to testify for reasons deemed unjustifiable by the court may be fined from ten to fifty rubles (Section 50). Witnesses make their testimonies without oath upon a warning of the responsibility for false testimony (Section 132). The court may refuse the examination of a witness whom it deems to be interested in the outcome of the case (Section 130). The order in which witnesses are examined is determined by the judge presiding over the hearing (Section 135). The court may order witnesses to be brought face to face to clarify conflicting points in their testimonies (Section 138). A litigant, if examined by the court, is not considered a witness (see *supra*).

7. Written Evidence

Written evidence may be presented by the parties and may also be ordered by the court from a third party (private correspondence not being exempt), on the initiative of the court or motion of either party (Sections 141, 142). The court may also issue the party a warrant for securing a document. A third party refusing to submit a document without justifiable reason may be fined as for refusal of testimony (Section 143). The soviet Code does not contain any provisions concerning the effect of refusal by a party to submit a document known to be in his possession. Such refusal is weighed by the court in its discretion.[70]

Written evidence may be contested except in cases especially provided for by law (Section 146), though the soviet jurists are vague on the cases so excepted.[71]

A particular feature of the soviet law of evidence, which was in substance carried over from the imperial

[70] *Id.* 166.
[71] *Id.* 167.

law, is the so-called objection of forgery. If the adverse party alleges that a document filed in the case is a forgery, the party filing it may waive the use of the document, in which case the court proceeds with the trial of the case on the basis of other evidence (Section 148). Otherwise, the party alleging the forgery must submit evidence thereof within a period fixed by the court (Section 149). The court then examines the document, compares it with other documents, hears witnesses, and compares signatures on the document with undisputed signatures or orders expert testimony (Section 150). If the court is convinced that the document is a forgery, it causes the removal of the document from the evidence and takes steps to institute criminal proceedings (Section 151). An attorney may raise the objection against genuineness of a document only if such a right is stated in his power of attorney (Section 18).

8. Attorneys

Parties may appear in court in person or through their attorneys. The power of attorney given by a private party must be given either verbally in court with an entry on the record, or it may be duly certified by a notary, a government agency where the party is employed, or the village soviet (Section 17). For men in the service certification may be made by the commanding officer or the chief surgeon of a hospital where the man is treated.[72] Power of attorney may be given not only to advocates (lawyers) but also to other persons specified in Section 16 of the Code of Civil Procedure. The power of attorney authorizes the taking of any procedural steps, except the following, unless they are

[72] U.S.S.R. Laws 1942, text 133. For translation see Vol. II, No. 2, comment to Section 265 of the Civil Code.

expressly provided for: to settle an action, submit it to arbitration, make confessions, abandon the claim in full or in part, transfer the power to another person, and receive money and property. An allegation that a document submitted by the adversary is a forgery may be pleaded only under a specific power issued therefor in the given case (Section 18).

9. Government Attorneys

An active role is assigned to government attorneys (district attorneys). The government attorney may initiate or enter any civil case at any stage of the proceedings, "if in his opinion this is required for the protection of the interests of the State and the toiling masses" (Section 2). His right to bring certain suits is especially emphasized (Section 2*a*). The government attorney does not in such instances become a party to the case but enjoys all the rights of a party. The court may decide that participation of the government attorney in a case is necessary, and such a decision is binding upon the government attorney (Section 12).[73] A case may be brought before the federal Supreme Court (the U.S.S.R. Supreme Court) only on protest of the Attorney General or presidents of the supreme courts. These judicial officers have also the right to bring the motion for reopening of the case after its final determination (see *infra,* Chapter 24, II).

Under the imperial law, the presence of the government attorney at the hearing of civil cases, and his opinion, were mandatory only in the higher courts and in

[73] The following sections deal with the participations of the government attorney: 2, 2*a*, 11, 12, 26, 80*g*, 83*a*, 172, 244, 252, 254, 254*a–d*.

specified groups of cases (cases involving minors, governmental institutions, validity of marriage, et cetera).[74]

10. Trial

The cases, with a few exceptions, are heard before a bench consisting of a professional judge and two people's assessors. A judge or assessor who is interested in the outcome of the case or has special relations with a litigant shall be removed from participation in the trial. The removal is made on the motion of a litigant but, even in the absence of such motion, it is the duty of the judge or assessor to retire in the presence of circumstances requiring his removal from the case (Section 104).

Hearings are public and are conducted in the language of a majority of the population in a given locality, and the court appoints interpreters when necessary (Section 9).

11. Judgment

There is no judgment on default under the soviet law, in the sense that the Code expressly provides that failure to appear by either party on whom the summons had been served does not prevent a hearing on the merits and rendition of a decision thereon (Section 98). But if both parties have failed to appear, without filing a motion that the case be heard in their absence, various consequences are provided for in the codes of different republics. Under the R.S.F.S.R. and Uzbek Codes

[74] Imperial Code of Civil Procedure of 1864, Sections 343–347, 561, 804, 1325, 1343–1345, 1423, 1451, 1457, 1460 [5], 1460 [6], 1460 [10]. The participation of the government attorney in civil cases was considerably restricted and better defined under the Law of May 5, 1911 (Imperial Laws 1911, text 913). Sections 343, 1343–1346 were modified.

(Sections 100 and 104 respectively), the court adjourns the hearing and repeats the service of the summons. If the parties fail to appear again, the case is dismissed, but the plaintiff may sue again within the period of limitation. Under the Turcoman, Ukrainian and Georgian Codes, the court may without another summons either decide the case on the merits or dismiss it. Under the Ukrainian and Georgian Code, the court may also suspend the proceedings in such instances, in which event the case is dismissed if duly notified parties do not move for resumption of the proceedings within one month.[75]

A judgment may be rendered only by judges who participated in the hearing at which the trial was completed, and must be announced in public. The judgment is made by a majority vote of the judges. No judge may abstain from voting. Each may attach to the records his dissenting opinion (Section 174). The judgment must be reduced to writing and signed by all the judges (Section 175). It must state the time at which it was rendered, the name of the court, the names of the trial judges and the litigants, the subject matter of the dispute, the contents of the decision with the grounds on which it was based and references to the laws the court applied. It also must indicate the manner in which an appeal may be taken from the judgment and must set out the apportionment of court costs (Section 176).

Within five days from the date of the handing down of the judgment, each of the parties may petition the court to render a supplementary judgment (a) if the court has failed to render a decision upon a prayer for relief regarding which the parties have presented evidence and pleadings, or (b) if the court, having decided

[75] Kleinman, *op. cit.*, note 63, at 194.

the issue of law, has failed to indicate the exact amount of the judgment or to specify the object to be delivered or claimed (Section 181).

The court decides cases on the basis of legislative enactments and decrees of the soviet government, as well as the ordinances of the local authorities. In the absence of a legislative enactment or a decree bearing directly upon the decision of the case, the court shall decide the case guided by the general principles of soviet legislation and the general policies of the soviet government (Sections 3, 4).[76] The soviet courts are prohibited from taking cognizance of any disputes arising from legal relationships antedating November 7, 1917.[77] Likewise, the soviet courts are prohibited from interpreting the soviet statutes on the basis of the laws of the overthrown governments and the decisions of the prerevolutionary courts.[78]

In examining contracts and documents made abroad, the court "takes into consideration" the laws effective at the place where these contracts or documents were made, provided that they are admitted by soviet laws or by an international agreement made by the Soviet Union with the country where they were made (Section 7). The soviet jurists attach particular importance to the words "takes into consideration." They deduce that this provision does not imply that the law of the place of making of the contract necessarily governs the form or any other element of the contract (*locus regit actum*). The soviet court, they say, must merely take such law into consideration but is not bound by it.[79] In the event

[76] See Chapter 5, I, 3 and Chapter 6, II, 2.
[77] Section 2, Law Enacting the Civil Code. See Chapter 8, I.
[78] Section 6 *id.* See Chapters 6, II, 2 and 8, I.
[79] Peretersky and Krylov 109.

of difficulty in applying foreign laws, the court may request the Ministry of Foreign Affairs to communicate with the foreign government concerned to obtain an opinion on the question involved. Such opinion is transmitted to the court by the said Ministry (Section 8).

Foreign judgments may be executed in the Soviet Union only on the basis of special international agreements covering this subject matter. An agreement concerning letters rogatory has been entered into between the United States and the Soviet Union.[80] All letters rogatory from United States courts should be presented through diplomatic channels. All important documents must be appended in Russian translation. All communications of the soviet court with persons or institutions abroad are made through the Ministry of Foreign Affairs (Section 67).

12. Appeal

From a judgment, i.e., a determination of the case on its merits, an appeal to the next higher court is permitted. Interlocutory orders deciding separate questions arising in the course of the proceedings may be appealed separately from appeal on the merits only where the law expressly so allows. The appeal must be filed within ten days from the rendition of the judgment with the court which rendered the judgment.

The appeal from the judgment of a court of original jurisdiction is a statutory right of a litigant and the government attorney. If filed within the time specified it carries with it automatic removal of the case into a higher court for review. Because the appellate court

[80] See exchange of notes between the U.S.A. and the U.S.S.R. concerning execution of letters rogatory signed November 22, 1935, 49 U. S. Stat., Part 2, 3840.

must verify "whether the judgment rendered is legally correct and well founded" (Judiciary Act of 1938, Section 15), the appellant may invoke both errors in law and errors in the determination of facts. The appeal must cite the judgment, specify the points of error, and make clear the petition of the appellant for a full or partial reversal of the judgment. The judgment may be reversed if the law has been violated or erroneously applied, or the judgment is in plain contradiction to the factual circumstances of the case as established by the trial court.

Appeals under the soviet system and a special remedy called "ex officio reopening of the case" present many particular features of their own and are discussed in detail in Chapter 24.

13. "Governmental Arbitration"

Disputes between government-owned enterprises are to a great extent exempt from the jurisdiction of the regular courts and are assigned to special quasi-arbitral tribunals (Sections 21, 22).

In the initial stage of the activities of government-owned quasi corporations, it was realized that arbitration would be the most appropriate method of settling their mutual disputes. Consequently, arbitration boards were established in 1922 apart from the judicial system. Each board consisted of a president and two members. Parties were represented largely by lawyers or by the employees of the organizations concerned. The term arbitration, *arbitrazh* in Russian, has been used since that time in soviet law to designate primarily the method of settling disputes between governmental enterprises. Supreme arbitration boards were attached to the Su-

preme Economic Council and the federal Council of Labor and Defense of each soviet republic, which at that time were the departments of the central government charged with management of the nationalized industries. The supreme arbitration boards reviewed, as courts of last resort, cases brought before them by appeal from the decisions of the various local boards attached to various government agencies which managed branches of industry. However, the Council of Labor and Defense and the Supreme Economic Council could review decisions of the supreme boards involving large sums of money.

By the Decree of March 4, 1931, all the arbitration boards, with a few exceptions, were abolished and cases under their jurisdiction were transferred to the regular courts.[81] However, on May 3, 1931, cases arising between governmental enterprises were again placed under the jurisdiction of new authorities.[82] At this time, the whole scheme of these authorities was called governmental arbitration (*Gosudarstvennyi arbitrazh*). The cases are now decided by a single permanently appointed government officer, acting as arbitrator. These arbitrators are organized in a hierarchy corresponding to the hierarchy of authorities controlling the soviet industries. The Arbitrator-in-Chief is attached to the federal Council of Ministers; under him are arbitrators attached to similar councils of the soviet republics (constituent and autonomous) and at the bottom are the arbitrators attached to the regional and provincial executive committees.

Apart from these are the arbitrators of "depart-

[81] U.S.S.R. Laws 1931, text 135. Kleinman, *op. cit. supra,* note 63 at 320 *et seq.*

[82] *Id.* 1931, text 203; also text 470.

mental" arbitration, who settle disputes between enterprises under control of the same government department. These arbitrators are appointed by and responsible to the head of the department.[83]

The following principles are characteristic of the procedure of "arbitration." Cases must be decided in the light of the purpose of making governmental enterprises follow strictly what the statute defined as "contractual and plan discipline and the commercial basis" in their activities.[84] This means that the general directions of the planned economy must be combined with adherence to the terms of contracts and the goal of commercial self-support of each enterprise. Arbitrators of the government arbitration are authorized to open proceedings on their own initiative, "if there is documentary proof of violation of contractual discipline."[85] The opinion of the arbitrator may be asked by any party in advance of making a contract.[86]

Cases are decided as a rule by the arbitrator jointly with "the executive representatives of the parties," or, in case of lack of agreement, by the arbitrator singly.[87] For a time it was held that at the hearing the parties must be represented by the heads of the organizations that are parties to the case or other high executives, not by legal counsel. However, in 1940, the heads of gov-

[83] There is no federal act on departmental arbitration, but acts for separate republics exist, e.g., R.S.F.S.R. Act of April 26, 1935, R.S.F.S.R. Laws 1935, text 136. Provisions concerning such arbitrations are occasionally given in the organic acts determining the internal organization of federal departments, e.g., People's Commissariat for Heavy Machine Building, U.S.S.R. Laws 1940, text 287.

[84] Section 2, Act of May 4, 1931, as amended by the Act of June 7, 1932, U.S.S.R. Laws 1932, text 269.

[85] *Ibid.*

[86] U.S.S.R. Laws 1933, text 445. Prior to this act disputes antecedent to a contract were settled by an administrative procedure.

[87] Section 6, U.S.S.R. Laws 1931, text 203.

ernment agencies were allowed to send, as was customary prior to 1931, duly accredited executives or lawyers instead. The arbitrator may, nevertheless, order the personal appearance of the head or any particular executive. If one or both parties fail to appear, the arbitrator may either adjourn the hearing or proceed *in absentia*.[88] Prior to the submission of the case to the arbitrator, parties must negotiate an attempt to settle the dispute by agreement.[89] The decision of each arbitrator is final and no appeal is permitted. However, the Arbitrator-in-Chief or the agency to which the trial arbitrator is attached (Council of Ministers, Regional Executive Committee) are authorized ex officio to review the case on their own initiative.[90] In making the decision, the arbitrator "shall be guided by the laws and decrees of the central and local government authorities and the general principles of the economic policy of the Soviet Union."[91] For a period of time, the arbitrators used to make their decisions on grounds of "economic expediency." A soviet textbook of 1940 scorns such practice as error and a "reflection in arbitration of the subversive theory of Pashukanis [see *supra,* Chapter 6] who denied the socialist nature of the soviet law." The textbook insists that there should be no opposition of "economic expediency" to soviet laws.[92]

[88] Letter of Instruction of March 21, 1940, No. 4, of the Governmental Arbitral Tribunal attached to the U.S.S.R. Council of People's Commissars (1940) Arbitration No. 9; Kleinman, *op. cit.*, note 63 at 330.

[89] The details of the procedure are regulated by "instructions" (directives) issued by the Governmental Arbitral Tribunal attached to the Council of Ministers. All such instructions issued prior to January 1, 1940, were repealed and replaced by those issued in 1940. See Order of the said Tribunal of January 27, 1940, No. 19 (1940) Arbitration No. 2. Kleinman, *op. cit.*, note 63 at 323.

[90] Kleinman, *op. cit.*, note 63 at 335.

[91] Section 8, U.S.S.R. Laws 1931, text 203.

[92] Kleinman, *op. cit.*, note 63 at 331.

Under the jurisdiction of governmental arbitration are placed, with the exception of disputes reserved for trial by ordinary courts:

All disputes concerning the execution of a contract or the quality of goods, and also other property disputes between institutions, enterprises, and organizations of the socialized sector of the national economy.[93]

The jurisdiction of the courts in disputes between government agencies is discussed in the comment to Section 2 of the Code of Civil Procedure.

14. Permanent Arbitral Tribunals

For cases arising from maritime trade and foreign trade and submitted to arbitration, special permanent arbitral tribunals have been established and attached to the U.S.S.R. Chamber of Commerce. Their jurisdiction is defined in Section 23 of the Code of Civil Procedure and they function under special statutes. These may be found in translation in Volume II, Nos. 45–48.

The Maritime Arbitration Commission consists of twenty-five permanently appointed members. If the parties submit their dispute to arbitration by this Commission, they select arbitrators from among its members. Appeals to the U.S.S.R. Supreme Court on the grounds of violation or erroneous application of law are permitted from awards of the commission. The commission, as well as the Supreme Court, base their decisions upon the soviet Code of Maritime Commerce, which, in general, regulates salvage, shipping, collision, affreightment, or consignment in conformity with the principles of international maritime law, and, in particular, with the Brussels Convention of 1910 to which the Soviet

[93] U.S.S.R. Laws 1931, text 203.

Union adheres (see Standard Salvage Agreement in Volume II, No. 24).

The Foreign Trade Arbitration Board was established under the Act of June 17, 1932.[94] It consists of fifteen members appointed for one year by the Presidium of the U.S.S.R. Chamber of Commerce from among members of commercial, industrial, shipping, and other government organizations, as well as from among persons having special qualifications in foreign trade. On submitting a case to arbitration, each party to a dispute selects an arbitrator from among the members of the board, and these elect the umpire also from among such members. A special submission is required to establish the jurisdiction of the board, unless such submission is included in the contract from which the dispute arises. If the award is not carried out voluntarily, it is subject to execution under the rules for execution of arbitral awards.[95]

[94] U.S.S.R. Laws 1932, text 281.
[95] Kleinman, *op. cit.*, note 63 at 100, 101.

Chapter 24

Appeals and Reopenings

I. Appeal

1. Preliminary

In the soviet system, appellate procedure in civil cases is governed by rules different from both those of Anglo-American law and those of civil law countries. It does, however, represent a combination of concepts and principles regulating appeal in civil law countries and employs a terminology borrowed from the same source. Therefore, a brief survey of the pertinent principles of civil law countries is indispensable for the understanding of appeals in soviet civil procedure.

The fundamental difference between Anglo-American and Continental European civil procedure lies in the absence of jury trial in civil cases in Europe. Jury trial after the English pattern was introduced in the nineteenth century in many countries of Europe, but for certain criminal cases only. Administration of justice in civil cases remained entrusted to courts consisting of professional judges deciding both questions of law and of fact. Soviet Russia is no exception. Although soviet trial courts are staffed chiefly by lay judges in addition to professional judges, they all constitute a single bench that gives joint decisions on all questions arising in the case, whether they be of law or of fact.

The decisions thus made in a civil case fall naturally into two categories: decisions disposing of the case it-

self, and judgments and interlocutory orders by which the courts decide separate procedural questions arising in the course of litigation. From the latter, appeal lies only in exceptional instances specified by the statute, primarily where an order, although not a formal judgment, bars further prosecution of the suit (e.g., an order by which the court refuses to take cognizance of the case). In all other instances, the aggrieved party may invoke the procedural or substantive error of an interlocutory order only in connection with the filing of a legal remedy against the judgment disposing of the case itself.

2. Appellate Review in Continental European Civil Procedure in General

By the nineteenth century, a certain type of appellate procedure was adopted in the majority of Continental European countries. It is governed by the so-called doctrine "of two resorts." The essential point of this doctrine is that each litigant is guaranteed a trial of the case on the merits, both on questions of law and fact, by two courts: the court of original jurisdiction and the next superior court—the intermediate appellate court.[1] A somewhat restricted remedy against the judgment of the intermediate appellate court lies in the court of third and last resort. This remedy is limited exclusively to errors in law, similarly to the writ of error; the court of last resort does not re-examine questions of fact.

The appeal is conceived of as the exercise of a statutory right by the litigant. If filed within the period of time specified by statute and in compliance with certain formal requirements, it carries with it automatic re-

[1] See Russian Code of Civil Procedure of 1864, Sections 162, 163, 174, 180 [1], 743, 745, and 772.

moval of the case into a higher court. The term "appeal" in a stricter and more technical sense is applied to the remedy against the judgment of the court of original jurisdiction (*appel* in French; *Appellation, Berufung* in German; *appello* in Italian; *apeliatsiya* in Russian). Such appeal is tantamount to a mere announcement of dissatisfaction with the judgment and a demand for retrial by the superior court, where the merits of the case as a whole are reviewed and the facts as well as the law are retried. The review may be made on the evidence taken and certified to the superior court from the lower court, but in many jurisdictions wide opportunity is given for the presentation of new evidence.[2] In any event, the appellate court has the right to order a new hearing of evidence already heard by the lower court. Accordingly, the review may turn into a new trial within the limits of the appeal and cross-appeal. The case is re-examined in all respects affected by the appeal.

The judgment of the court of original jurisdiction is not considered a final determination of the cause unless and until the period for appeal has expired without such being filed. In specified cases, however, the court may permit execution. On the contrary, the judgment of the intermediate appellate court is deemed a final and executory determination of the case subject to immediate execution. The appellate court may, however, suspend execution if a further appeal is filed.

Against the judgment of the intermediate appellate court lies a remedy for errors in law only. Such remedy is also a statutory right of the litigants. However, in

[2] *Id.*, Section 776 [1] (enacted in 1914); Hungarian Code of Civil Procedure of 1911, Section 489; Polish Code of 1932, Sections 395 and 404; German Code of Civil Procedure, Art. 529; Austrian Code of Civil Procedure, Arts. 468, 476 and 482.

order to cause the removal of the case to the court of third and last resort, the appeal must not only be filed within the period of time specified by statute but must also specify the grounds on which the party contends the judgment was erroneous, and these grounds must be of the kind defined by statute. Technically, this remedy is not called an appeal. Various countries follow either the French type [3] of procedure in the court of last resort termed "cassation" (quashing) or the German type called "revision." [4]

3. The French Cassation

The court of cassation of the French type—*cour de cassation*—is visualized in the words of Roscoe Pound as an "ultimate tribunal, passing on questions of law only and quashing erroneous judgments without rendering any judgment in the case itself." [5] There are only two possibilities: either the appeal for cassation is rejected or the judgment is reversed and a new trial by the same or another intermediate appellate court is ordered. This procedure does not offer the appellant any method to have an error in the determination of facts reversed. The French Law of November 27, 1790, which is still in force, defines cassation procedure as follows:

> 3. It [the court of cassation] shall quash all proceedings in which the formal requirements have been violated, and every judgment which contains an express contravention of the text of the law. . . . The violations of the forms of procedure prescribed under penalty of nullity and contravention of laws . . . shall give rise to cassation.

[3] E.g., Italy, Spain, imperial Russia, Rumania, Portugal, Belgium.
[4] Austria, Hungary, Poland, Yugoslavia and the Netherlands, where cassation is essentially a revision.
[5] Roscoe Pound, Appellate Procedure in Civil Cases (Boston 1941) 16.

Under no pretext and in no case may the tribunal examine the merits of the cases (*fond des affaires*). After having quashed the proceedings or the judgment, it shall remand the merits of the cases to the tribunals which shall take cognizance thereof, as shall be set forth hereafter.[6]

4. Imperial Russian Law

Before the Judicial Reform of 1864 a party could cause the removal of a civil case to two successive higher courts—the regional court of appeals and the Senate, the Supreme Court. Both reviewed the whole case on the merits. But if the justices of the department of the Senate could not reach a unanimous decision, or the Minister of Justice or the government attorney attached to the Senate disagreed with the decision, the case was ex officio removed to the Plenary Session of the Senate. Thence it was also ex officio removed to the State Council, if a two-thirds majority decision was not reached or if the Minister of Justice disagreed with the decision. Even after that procedure a party could petition the Emperor through a special committee on petitions and the case could be returned to the Senate for reconsideration.

However, this cumbersome procedure was completely remodeled after the French pattern in 1864. The judgment of the court of original jurisdiction could be reviewed on the merits only by one intermediate appellate court against whose decision an appeal for cassation was

[6] Il annulera toutes procédures dans lesquelles les formes auront été violées, et tout jugement qui contiendra une contravention expresse au texte de la loi.

. . . la violation des formes de procédure prescrites sous peine de nullité, et la contravention aux lois . . . donneront ouverture à la cassation.

Sous aucun prétexte et en aucun cas, le tribunal ne pourra connaître du fond des affaires: après avoir cassé les procédures ou le jugement, il renverra le fond des affaires aux tribunaux qui devront en connaître, ainsi qu'il sera fixé ci-après.

open to the court of last resort. For all major cases this was the Supreme Court, the Ruling Senate (see also *infra,* p. 899).

The grounds for quashing a judgment (grounds of cassation) were defined as follows:

> Petitions for cassation of judgments shall be permitted:
>
> (1) In case of obvious violation of the direct meaning of the law or an error in its interpretation;
>
> (2) In case of violation of forms and manners of judicial procedure so essential that in view of their nonobservance the judgment must be denied the effect of a judicial determination;
>
> (3) In case of violation of the limits of jurisdiction or powers enjoyed by the intermediate appellate court.[7]

The Ruling Senate, the Supreme Court of imperial Russia, interpreted its functions as the court of last resort, as follows:

> The Senate in the capacity of a court of cassation examines only the legal aspect of cases under its review—i.e., it verifies the correctness of interpretation and application of the law by the courts, the precise observance of rules and forms of judicial procedure, and the maintenance of jurisdiction and competence of the courts, but it does not decide cases on their merits and therefore may not examine a question, raised for the first time in the appeal for cassation, and requiring for its decision that the Senate establish the facts in the case.[8]
>
> The judgment of the Cassation Division is passed, not upon disputes of the litigants over some private right, but on questions of the true meaning of the law and its correct application to the facts established by a court, and only to this extent does

[7] Imperial Code of Civil Procedure of 1864, Section 795. With regard to local courts (justices of the peace), an identical rule is stated in Section 186. Re intermediate appellate courts, see Sections 162, 163, 171, 173–175, 181; 743, 745, 755, 758, 762, 771–774. The appellate procedure was regulated before 1864 in Sections 533 *et seq.*, 586 *et seq.*, 602 *et seq.*, Laws of Civil Procedure, Vol. X, Part 2, Code of Laws (1857 ed.).

[8] Ruling Senate, Civil Cassation Division, Decision of 1885, No. 79. See also Iablochkov, Course in Civil Procedure (in Russian 1913) 187.

the court of cassation examine the appeal for cassation on its merits.[9]

5. Revision

"Revision" differs from "cassation" in that under it the court of last resort may enter a new judgment disposing of the case. Its re-examination of the case is confined to questions of law. But in respect to matters contested by the appellant, the court reviews the merits of the case on the evidence taken and certified to it from the lower court. The revisional court may affirm or modify the judgment or enter a new judgment provided the facts established by the lower court are sufficient for such decision.[10] The judgment is reversed wholly or in part, and the case is remanded for a new trial, only if additional findings of facts are necessary, or if in the proceedings of the lower courts such errors occurred as to invalidate them.[11] In some jurisdictions (e.g., under the Hungarian Code of 1911) even the findings of the facts could be attacked on the ground that, in the process of establishing the findings, the lower court failed to apply or incorrectly applied a rule of law, or came to an erroneous conclusion of a factual nature.[12]

[9] *Id.*, Decision of 1879, No. 719. See also Textbook of Civil Procedure (in Russian 1938) 190.

[10] German Code of Civil Procedure, Arts. 559, 561, 564 and especially 565; Hungarian Code of Civil Procedure, Sections 534, 543; Austrian Code of Civil Procedure, Arts. 504, 510.

[11] German Code of Civil Procedure, Art. 561; Austrian Code of Civil Procedure, Art. 510; Hungarian Code of Civil Procedure, Section 543.

[12] Hungarian Code of Civil Procedure, Section 534, par. 3. See Machik and Gsovski, Hungarian Code of Civil Procedure (in Russian, Uzhorod 1923) 272.

6. Appeal Under Soviet Law: General Characteristics and History

Appeal under soviet law appears to be a kind of hybrid of all these concepts. Under the imperial regime, the French type of appeal and cassation prevailed (see *supra* 4). The first soviet decree on the courts, No. 1 of November 24, 1917,[13] which dissolved all the existing judicial bodies and established instead new people's courts, did away with the doctrine of two resorts in that it abolished the intermediate appellate court. Only "cassation" of the judgment of the court of original jurisdiction was permitted. This terminology and the principle that a party may normally carry the case for review to one superior court only were maintained by the Code of Civil Procedure of 1923. The Code permits appeal to one superior court only and calls it "appeal for cassation" (*kassatsionnaya jaloba,* Section 235). The appellate divisions of higher courts are called "cassation" divisions, and there is no intermediate appellate court. However, the rules governing the soviet "cassation" proceedings have gradually departed from the pure cassation type. On the one hand, they bear more resemblance to the German "revision"; on the other hand, they permit the court of review to re-examine the case on its merits to an extent resembling the former appellate review on the merits by the intermediate appellate court. Moreover, the appellate court is granted the power to re-examine the case in excess of the petition of the appellant.

A case once finally determined by an appellate court may be reopened by a third or even fourth court (the U.S.S.R. Supreme Court and the supreme courts of the

[13] R.S.F.S.R. Laws 1917–1918, text 50.

constituent republics) on the motion of the attorneys general of the Union and the republics and the presidents of the supreme courts (Section 254). Parties have no right to petition the court to reopen the case. However, they may and actually do cause the case to be reopened by bringing their grievances to the attention of the above-mentioned judicial officers, who are authorized to file the motion (see *infra* II).

The draft of the Code of Civil Procedure and its original text, put into effect on September 1, 1923, not only called the soviet appeal "cassation," but also defined the powers of the appellate court in accordance with the doctrine of cassation outlined above (see *supra* 3 and 4), as follows:

246. Should the superior court hold the appeal groundless, it shall reject it. In case the appeal is held justified, the superior court shall reverse the judgment wholly or in part, and either dismiss the case whenever the cause is not subject to judicial proceedings, or the right to sue is absent, or remand either the whole case or the reversed part thereof for a new trial by the lower court, composed of other judges (original text of 1923).[14]

Thus, the appellate court at first had no power to modify the judgment or to render a new judgment. However, an element of "revision" was introduced as early as July 24, 1924.[15] The provisions of Section 246 were then changed to the effect that the appellate court may also "modify the judgment itself without remanding the case for new trial." To this clause, however, was added a proviso insisting that only such modifications "are permissible as are called for by error in the application of one law or another and in no way constitute any modification of the judgment on the merits of

[14] *Id.* 1923, text 478.
[15] *Id.* 1924, texts 688, 783.

the case." Simultaneously, in the legal periodicals, voices were raised for more open introduction of the principle of revision.[16] A further step in this direction was taken in 1929, when all the provisions concerning appeal were changed and the new appellate procedure with the hyphenated name "cassation-revisional" procedure was introduced.[17] In 1930 several categories of judgments were exempted from appeal, but in 1936 all these restrictions were removed.[18] At present the soviet "cassation-revisional" procedure on "appeal for cassation" has the following characteristics.

7. Soviet Appellate Review of Error in Law: Quashing Powers

The power of review granted to the soviet appellate court appears to be multifarious. The first duty of the court is to check errors in law. Section 237 of the Code states two general grounds for reversal of a judgment and defines the first as "violation or erroneous application of the laws in force, in particular of Section 4 of the present Code." Section 4, here referred to, instructs the court to apply, in the absence of a statute or decree bearing upon the case, "general principles of the soviet legislation and general policy of the workers' and peasants' government." In instances where an error in law is ascertained, the appellate court must proceed in the manner of a "court of cassation"—i.e., it shall reverse the judgment and remand the case for a new trial. Thus, the U.S.S.R. Supreme Court instructed the lower courts in 1935 as follows:

[16] Collection of Articles and Material on Civil Procedure Published in 1922–1924 (in Russian 1925) 234 *et seq.*
[17] R.S.F.S.R. Laws 1929, text 851, Section 246.
[18] *Id.* 1937, text 136.

The basic duty of appellate courts is to see to it that the soviet laws, both substantive and procedural, are correctly applied and understood. For this reason, where the appellate court comes across a material violation of basic procedural rights of any one of the parties in the course of the proceedings (for example, where any of the parties was not notified of the hearing of the case, or was deprived of an opportunity to submit evidence in the case, etc.), the appellate court in the cassation-revisional procedure shall reverse the judgment and remand the case for a new trial.[19]

The appellate court may also reverse the judgment and dismiss the case, "if the plaintiff has no right to sue or if the cause is not subject to a judicial determination." These powers may also be considered corrective of errors in law, but in authorizing the court of last re-

[19] U.S.S.R. Supreme Court, 52nd Plenary Session, Ruling of October 28, 1935, Art. 3, Code of Civil Procedure (1941) 151; *id.* (1943) 213. The Rules of Procedure (*Nakaz*) established on December 28, 1924, for the civil appellate division of the R.S.F.S.R. Supreme Court, still quoted as a guide in the official textbook of 1938, but omitted in the 1940 edition, give the following illustrative enumeration of errors in consequence of which the division reversed judgments and remanded cases to the lower courts:

1. Where the elementary requirements of the rules of civil procedure have been violated, viz.:
(a) Where the trial court was unlawfully constituted;
(b) Where the court has taken cognizance of a cause not subject to judicial determination;
(c) Where the case has been decided in the absence of a party who was not duly served and did not know of the proceedings;
(d) Where a decision has been rendered with regard to a person having no relation to the case and not joined in the case as party plaintiff or party defendant.
2. Where substantive or adjective laws protecting the essential interests of the workers' and peasants' State have been violated or erroneously interpreted, although such violations were not indicated by the appellant.
3. Where the decision contained in the judgment does not offer, because of its incompleteness or indefiniteness, a clear idea of what, in fact, has been adjudicated.
4. Where the decision contained in the judgment is in irreconcilable conflict with the descriptive part thereof (opinion), so that the appellate court is unable to pass on the correctness of the judgment because of lack of motives or because the decision is insufficiently supported by the facts.
5. Where the decision rendered is in conflict with another final court decision, unless the latter is subject to repeal in the same or another proceeding.

Textbook of Civil Procedure (in Russian 1938) 200.

sort to make the final decision in the case itself, they are more akin to the revision type of procedure.

It may be noted that under the soviet law the lack of jurisdiction of the trial court does not constitute in itself a ground for reversal of its judgment. Thus, the R.S.F.S.R. Supreme Court has ruled:

> Mere lack of jurisdiction may not serve as a reason for the reversal of a judgment except in cases where the appellate court shall have decided that the trial of the case by the proper court would have essentially affected the decision in the case. But where a judgment is reversed [on this ground], the appellate court shall remand the case for a new trial by the proper court.[20]

8. Powers of the Appellate Court to Examine the Case on the Merits

The second ground for reversal of a judgment of a court to original jurisdiction is formulated by the Code of Civil Procedure as "plain contradiction by the decision of the factual circumstances of the case as established by the court of original jurisdiction."[21] Furthermore, Sections 245 and 246 of the R.S.F.S.R. Code outline the whole appellate procedure along the lines of "revision." Thus, the superior court must "in every instance re-examine the case on its own initiative in a *revisional* procedure" (Section 245) and has the power of modifying the judgment of the lower court "without remanding the case for a new trial," provided these modifications "do not require new evidence or additional hearing of evidence" (Section 246). Finally, according to the federal Judiciary Act of 1938, it is the duty

[20] R.S.F.S.R. Supreme Court, Circular Letter No. 26, 1924, Code of Civil Procedure (1941) 203; *id.* (1943) 215.

[21] R.S.F.S.R. Code, Section 237, subsection (b); Uzbek Code, Section 250; Ukrainian Code, Section 268; Azerbaijan Code, Section 237; Georgian Code, Section 270; Byelorussian Code, Section 280.

of the superior court in reviewing the case on appeal to ascertain "whether the judgment is legally correct and well founded" (Section 15). The concluding phrase of the clause is explained in the textbook on civil procedure of 1946 as follows:

> The judgment should be deemed unfounded:
>
> (a) If it is in conflict with the facts established by the court during the trial;
>
> (b) If the court failed to clarify the true rights and relations of the parties, i.e., failed to elucidate all facts from which a correct conclusion might be drawn concerning the mutual relations and the rights of the parties;
>
> (c) If the court has taken facts as proved without sufficient reason therefor (i.e., if the facts established by the court are not all supported by evidence, or are supported insufficiently), or vice versa, if the court refused to take one or another fact as proved in spite of the presence of sufficient evidence.[22]

All these provisions and especially the above comment, point to the power of the appellate court to re-examine the case on its merits and to re-evaluate the evidence. This procedure is close to the "appellate" review of an intermediary appellate court, a trial *de novo* without repeating the evidence.

The question arises whether the appellate court may make a new decision in the case itself. In this respect, the provisions of the procedural codes of the individual soviet republics show some divergency. Some of these codes distinctly provide that the appellate court may make an entirely new decision on the merits of the case. Thus, the Azerbaijan Code (Section 246) states that the civil appellate division of the Supreme Court may hand down a new decision on the merits of the case where no clarification of facts is needed or where the final conclusion of the lower court is correct and only the rea-

[22] Abramov, Civil Procedure (in Russian 1946) 175.

sons are to be changed, as well as where the case comes up to the appellate court for the second time and the lower court has not followed the ruling of the appellate court given at the first appellate trial. The Byelorussian Code (Section 289) states that the appellate court may "decide the case anew if this does not require new evidence." The Ukrainian Code (Section 277) grants the appellate court the power to change the decision of the lower court where it is in conflict with the facts in the case.[23] The R.S.F.S.R. Code, as amended in 1929, directly provides for a "new decision" only in certain instances for labor cases (Section 246*a*). Otherwise it permits the appellate court:

> . . . To modify the judgment rendered without remanding the case for a new trial, but only such modifications are permissible as are called for in view of an error in the application of law by the court of original jurisdiction or in view of a discord between the decision and the facts of the case established in court, and these modifications do not require collecting or additional hearing of evidence (Section 246*c*).

No judgment which is essentially correct may be reversed for purely formal reasons. The R.S.F.S.R. Supreme Court issued in 1935 the following instruction with regard to this matter:

> 1. In reviewing the case in a cassation-revisional manner under Section 246, the appellate court may only, on the basis of facts and circumstances established by the court of original jurisdiction, modify the judgment of the latter but has no right to make a new decision contrary in content to the judgment of the lower court. Should the appellate court deem the judgment of the court of original jurisdiction wholly erroneous, the appellate court must reverse the decision and remand the case for a new trial.

However, in the same ruling, the possibility of a new

[23] *Op. cit. supra,* note 19 at 200–201; Kleinman, editor, Civil Procedure (in Russian 1940) 265.

decision was also suggested and this was reaffirmed by the U.S.S.R. Supreme Court on April 25, 1947:

> 2. In order to combat red tape and to avoid the repeated reversal of judgments followed by the remanding of cases for new trial, the appellate court may, in reviewing the same case for a second time in a cassation-revisional manner, render its own decision finally disposing of the litigation, if it finds that the judgment of the lower court must be reversed again because of the violation of appellate rulings given upon the previous reversal, and provided that the facts of the case are so clear that there is no need whatsoever for additional evidence. The appellate hearing in such instances must be conducted on notice to the parties and the government attorney.[24]

The ruling of the U.S.S.R. Supreme Court suggests, however, that in such instance the appellate court sets aside the judgment and tries the case itself as the court of original jurisdiction.

In 1935, the U.S.S.R. Supreme Court instructed all the soviet courts to proceed in the following manner with regard to the facts in the case:

> 3. The appellate court must ascertain first of all whether all essential circumstances of the case have been fully established by the court of original jurisdiction and in the event that the factual phase of the case has not been adequately investigated, remand the case to the court of original jurisdiction for additional investigation and specify the subject matter which is to be so investigated.
>
> The appellate court must also ascertain whether the lower court has correctly arrived at a logical deduction from the established facts, and whether the law was correctly applied by that court.
>
> Relying upon facts exactly established by the court of original jurisdiction, the appellate court in cassation-revisional procedure has the right either to reverse the judgment and remand the case for a new trial, or to dismiss the proceedings (sub-

[24] R.S.F.S.R. Supreme Court, Presidium, Protocol No. 49, July 3–4, 1935, Code of Civil Procedure (1941) 204; *id.* (1943) 212. U.S.S.R. Supreme Court, Plenary Session, Ruling of April 25, 1947, No. 7/1/Y (1947) Socialist Legality No. 6, 18–19.

section (b) of Section 246 of the Code of Civil Procedure) or to modify the judgment without remanding the case for a new trial. However, under the guise of modifying the judgment, the appellate court has no right to make a new decision with respect to facts which have not been considered and verified by the court of original jurisdiction.[25]

Thus, though permitted in certain instances to re-examine the findings of facts, the soviet appellate court must refrain from such re-examination as would necessitate the hearing of new evidence or the rehearing of the evidence already taken by the lower court. Otherwise, the power of review granted to the soviet appellate court extends almost as far as the power of an intermediate appellate court in other European jurisdictions. In one way, it may go even further, as is evident from a further aspect of appellate review.

9. Review in Excess of the Petition of the Parties

In contrast to all other European jurisdictions, the soviet appellate court "is not bound by the grounds of error specified in the appeal for cassation, and it is its duty in a revisional procedure to examine on its own initiative in every instance the whole case, both in its contested and uncontested parts, as well as with regard to the parties who did not file any appeal." [26]

[25] U.S.S.R. Supreme Court, 52nd Plenary Session, Resolution of October 28, 1935, Code of Civil Procedure (1941) 152; *id.* (1943) 212.

[26] R.S.F.S.R. Code of Civil Procedure, Section 245 (as amended 1929). The Azerbaijan (Section 245) and Uzbek (Section 258) Codes have the same provisions as Section 245 of the R.S.F.S.R. Code. Some small divergencies are to be found in individual codes of certain other soviet republics. The Byelorussian Code, not confining the court to errors specified in the appeal, stresses its duty to ascertain whether or not there are any other violations of law (Section 288). Under the Georgian Code, the appellate court shall re-examine the case in a revisional procedure, but the judgment may be set aside in its uncontested parts, or with regard to parties who did not bring any appeal, only in case the interests of the State or the toiling masses have been violated (Section 278). The Ukrainian Code makes the re-examination of the case in a

It may be noted that in the European countries in which the revision type of procedure prevails, the court of last resort may also review phases of the case uncontested by the appellant. However, this power is limited to errors in procedure expressly specified by statute and affecting the fundamentals of a fair trial, such as lack of legal capacity to sue, illegal composition of the court, lack of authority or power of attorney.[27] Thus, the scope of review of a soviet appellate court is wider than that of a "revision" court. It also exceeds in scope the usual powers of review of an intermediate appellate court.

10. Hearing in the Appellate Court

The following description of the hearing in the appellate court is given by the soviet textbook of 1938:

> The hearing in the appellate court begins with the verification of notice to parties and their appearance. One of the members of the court then reports the case. According to the ruling of the U.S.S.R. Supreme Court, the presiding judge as well as the judge-rapporteur must have studied the case in advance. The report must be sufficiently comprehensive, and a party may ask for its supplementation if necessary. Then the parties plead the appeal. The U.S.S.R. Supreme Court has also ruled that "no arbitrary time limit shall be set to the pleadings and the parties must be given an opportunity to present all their arguments in the case." From Section 15 of the federal Judiciary Act of 1938, it follows that, at the hearing of the appeal, the parties have the right to submit new material to the appellate court which ascertains whether the judgment is legally correct and well founded. After the pleadings of the parties, the government attorney, if present, states his opinion.[28]

revisional manner optional and not mandatory upon the appellate court (Section 276).

[27] E.g., Hungarian Code of Civil Procedure of 1911, Sections 540, 541; Austrian Code of Civil Procedure, Arts. 477, 510; German Code of Civil Procedure, Art. 559.

[28] *Op. cit.*, note 19 at 196.

A somewhat simplified procedure is suggested by the more recent textbooks of 1940 and 1946. These also emphasize the right of the parties to present new written evidence before the appellate court but otherwise describe the appellate hearing as follows:

> The open appellate hearing takes place in compliance with the basic principles (it is public, oral, and the like), and begins with the report of one of the judges of the appellate bench. He relates the legal provisions the violation of which is involved, and the reasons for which the judgment is alleged to be unfounded or in conflict with the facts of the case; the parties are entitled to supplement his report. Thereafter, the appellant has the floor to develop the reasons of his appeal, and the other party may plead against the statements of the appellant. The government attorney then gives his opinion on the correctness or the error of the judgment, and the court withdraws to the conference room.[29]

It must also be borne in mind that though the parties have the right to appear before the appellate court and plead therein, they have in many instances little chance to do so, because they are notified of the date of hearing on the appeal only in the regional (provincial) courts. The parties may learn of the date of hearing by the supreme court of a constituent republic only from the posting of the date on a board in the court building which is done five days before the hearing.[30]

It may also be observed that the appellate procedure outlined above is not adequate in view of the broad powers of the appellate court. As shown above, such a court may practically review the credibility of witnesses and evaluate other evidence and yet does not hear the evidence and is therefore bound to rely merely on the written record thereof.

[29] Kleinman, *op. cit. supra,* note 23 at 262; Abramov, *op. cit. supra,* note 22 at 174.

[30] Kleinman, *loc. cit.*

II. Ex Officio Reopening of a Decided Case

1. General Survey

An appeal to the next superior court is the only remedy plainly afforded the litigants for the correction of judgment in the soviet civil court. However, the parties may bring about the review of any final determination of their cause in an indirect way. Any case finally determined by the court of original jurisdiction or by the appellate court may be reopened ex officio by the supreme court of the soviet republic under whose jurisdiction falls the court which rendered the judgment, or by the U.S.S.R. Supreme Court, whose jurisdiction extends over every court in the soviet territory, including the supreme courts of individual republics. A party has no right to petition these courts for a review. The proceedings are initiated exclusively upon a so-called "protest," a motion by certain high judicial officers enjoying supervisory powers over the administration of justice, including the Attorney General of the Union, the attorneys general of the republics, and the presidents of the federal Supreme Court and the supreme courts of the constituent republics. This proceeding is conceived of as a matter of internal supervision of the judicial activities of the courts. The competent judicial officer may file such motion, if in his opinion a judgment involves a "particularly essential violation of laws in force or a plain violation of the interests of the workers' and peasants' State or the toiling masses." [31] This

[31] R.S.F.S.R. Code of Civil Procedure, Section 254 *b*; Uzbek Code, Section 269; Byelorussian Code, Section 298; the Ukrainian Code, Section 288, defines the ground for the motion: "if the decision is in contradiction with the fundamentals of soviet legislation or the general policy of the workers' and peasants' government or otherwise violates the interests of the State and the toiling masses."

is the only method by which a civil case may be brought before the federal U.S.S.R. Supreme Court. Parties themselves have no direct access to this supreme tribunal of the Soviet Union. In fact, the only type of review in civil cases assigned to the jurisdiction of the U.S.S.R. Supreme Court at the present time is the ex officio re-opening of cases upon the "protests" of the above-mentioned judicial officers. The Judiciary Act provides that the decisions of the supreme courts of the soviet republics are not subject to appeal (Section 15) but allows the U.S.S.R. Supreme Court to hear the "protests" of the above officers.[32] A case decided by a division of the U.S.S.R. Supreme Court may be reopened on the motion of its president or the Attorney General, by the Plenary Session of all justices of the same court.

It may also be mentioned that a criminal case which has ended in a final acquittal or conviction may likewise be reopened ex officio in a manner similar to the reopening of civil cases (Code of Criminal Procedure, Sections 440–444).

Filing of the motion for reopening the case ex officio is not limited to any particular period of time. If the motion is granted, the Supreme Court itself proceeds with the review of the case, enjoying more power in disposing of the case than the regular soviet appellate court. The court, in reviewing a case reopened ex

32 The codes of civil procedure of individual republics do not mention the federal supreme tribunal—the U.S.S.R. Supreme Court—and there is no law which provides for any proceedings to be initiated by a private party before that court. The Judiciary Act provides in general that the U.S.S.R. Supreme Court shall "exercise supervision over the administration of justice by all the judicial institutions of the U.S.S.R. and the constituent republics" (Section 63). The Supreme Court exercises this supervision "by means of . . . the examination of *protests* of the U.S.S.R. Attorney General and the President of the U.S.S.R. Supreme Court against *final* judgments and orders rendered by courts in criminal and civil cases" (Section 64). (Italics supplied.)

officio, may, as an appellate court, reverse the judgment and remand the case for a new trial, dismiss the case if the plaintiff has no right to sue or the cause is not subject to judicial determination, and modify the judgment. But above and beyond that, it may enter an order affirming any of the decisions rendered by any court in the case, and it may also "render a new judgment if all the circumstances of the case are fully established and there is no need whatsoever for the collection or additional hearing of evidence" (Code of Civil Procedure, Section 254*a*).

The reopening of the case ex officio was originally conceived, not as a remedy for the litigants, but as a means for judicial officers, primarily the government attorneys, to correct obviously defective work of the lower courts or to bring court decisions into line with government policy. Another purpose was to achieve a uniform interpretation and application of the soviet statutes by the courts. The hearing of the motion and the review of the case has been and is conducted *in camera,* in the absence of the parties to the case.[33] However, aggrieved private parties soon recognized the possibility of obtaining redress by taking steps before the competent officers to cause them to file the motion. This practice of bringing to the attention of judicial officers a petition for such a motion is not based upon any statutory provisions but is quite common, according to the official soviet textbook on civil procedure.[34] The official tariff of lawyers' fees of March 25, 1940, expressly provides for a fee which may be charged by a

[33] Abramov, *op. cit. supra,* note 22 at 182; Strogovich, Criminal Procedure (1946) 494.

[34] Civil Procedure Textbook (in Russian 1938) 211; Kleinman, *op. cit. supra,* note 23 at 272.

lawyer for the preparation of such petition.[35] The textbooks mentioned above stress the free use of discretion by the judicial officer in deciding whether or not to file the motion. If the officer refuses to take steps, the party is barred from a direct appeal to a higher court but may, nevertheless, petition a higher officer. It is evident that such petitions are extrajudicial remedies to be decided in nonjudicial procedure. A ruling of the U.S.S.R. Supreme Court, issued in 1935, regulates at least one phase of the proceedings preliminary to the filing of the motion as follows:

> Very frequently motions for ex officio reopening of the case are filed on the basis of unilateral information furnished by the aggrieved party which leads to mistakes in deciding the case. For this reason, where in the course of the preliminary investigation of the case the need for its review becomes evident, the other party should, provided special difficulties are not thus caused, be summoned or asked to furnish written explanation with respect to the petition filed and especially with respect to such documents as are presented for the first time to the supervisory officer, and upon receipt of the required explanation it should be decided whether or not a motion for ex officio review should be filed. If the petition in itself does not furnish any ground for ex officio reopening of the case, the petition must, of course, be denied without the explanation from the other party.[36]

From this ruling, it follows that the process of obtaining a motion has developed into a quasi-judicial but behind-the-court-doors procedure. No particular statutory provision regulates the procedure of the Supreme Court whenever it reviews a case reopened ex officio.

[35] Order of the U.S.S.R. Commissar for Justice of March 25, 1940, No. 25, see Soviet Advocates (in Russian 1942) 19.
[36] *Op. cit. supra*, note 19 at 196.

Recent soviet textbooks state plainly that it is done *in camera,* without participation of the parties.[37]

This reopening of the case ex officio is not totally without precedent in the presoviet Russian civil procedure.

2. Ex Officio Reopening of the Case Under the Imperial Law

Such reopening was permissible in minor civil cases, primarily those involving less than 300 rubles ($150 at par), except in disputes over real property and certain others. These minor cases were tried by the so-called local courts, of which there were several in each county, as courts of original jurisdiction. As an intermediate appellate court, judicial sessions were established in each county consisting of three local judges, the judge who decided the case being excluded. In 1864, when the function of the Ruling Senate as the only court of cassation for the whole of Russia was established, appeal for cassation from the judgments of county judicial sessions was permitted directly to the Senate.[38]

In 1889, the lower courts were changed. In the greater part of Russia, the elected justices of the peace were replaced by appointed rural magistrates. Then, in order to bring the court of last resort closer to the population and to lighten the docket of a single supreme court, provincial judicial sessions were created as courts of cassation for cases decided by the county sessions as intermediate appellate courts.[39] In order to reconcile

[37] See *supra,* note 33.

[38] Code of Civil Procedure of 1864, Sections 189, 801 as originally enacted.

[39] Rules of Judicial Organization and Judicial Procedure in Localities Where the Statute on Rural Magistrates (*Zemskie Nachalniki*) is in

the existence of many courts of last resort with the general principle that the Ruling Senate is the only supreme court and guardian of the uniform application and interpretation of the law, the Ruling Senate was granted the power to reopen a case determined by a provincial session, should it deem that the decision of the latter be contrary to "correct and uniform application of law." [40] Such reopening could take place only upon the motion of the Minister of Justice presented to the Senate after consultation with the Minister of the Interior, if they deemed that the provincial session "plainly departed from the true meaning of law." [41] The presentation of the motion was a matter of discretionary and supervisory power with the Minister of Justice. Any litigant had the right to petition the Minister of Justice for filing the motion. If reopened, the case was remanded by the Senate to the lower courts for a new trial.[42] The Judicial Reform of 1912 restored the function of the Senate as the only cassation court for entire Russia, and the ex officio reopening of judicial cases was abolished.[43]

However, in the administrative procedure, the ex officio reopening of a case was permitted in certain instances.[44]

Force, Code of Laws (Svod Zakonov) Vol. XVI, Part 1 (1857 ed., as amended 1906, 1908, 1909, 1910), Sections 11, 124, 127 re appeal; Sections 129, 137 re cassation. The regional courts of appeals in the Transcaucausus and Siberia were also made cassation courts in 1866 and 1896, Code of Civil Procedure, Sections 1470, 2134.

[40] Judiciary Act of 1864, as amended after 1889, Section 1195.

[41] Statute on the Authorities in Charge of Peasant Affairs, Section 123, Note, Code of Laws (Svod Zakonov) Vol. IX (1902 ed.) Special Appendix.

[42] Decisions of the Ruling Senate quoted in an edition of the Rules on Judicial Organization etc., referred to in note 39, annotated by Chagin (7th ed. in Russian 1911) 189–190.

[43] Law of June 15, 1912, Imperial Laws, text 1003.

[44] *Lex cit. supra,* note 41, Sections 120, 122.

3. Development of Ex Officio Review Under the Soviets

The original provisions of the Code of Civil Procedure as promulgated in 1923 merely mentioned the right of the R.S.F.S.R. Attorney General and provincial government attorneys to lodge a protest before the Supreme Court against "a judgment in a case finally disposed of," if they should find therein "an essential violation of the laws in force" or "a violation of the interests of the workers' and peasants' government and the toiling masses" (Section 254). Filing of such protest was not limited to any period of time. The same officers also had the right, upon filing the protest, to suspend the execution of the protested judgment.

The nature of this remedy was defined by the Ukrainian Supreme Court concurrently with the R.S.F.S.R. Supreme Court, as follows:

> The ex officio reopening of cases disposed of by a final judgment or order is established by no means in the interests of the litigants but exclusively for the purpose of co-ordinating the judgments and orders of the courts with the interests of the State and the toiling masses.[45]

Thus, this type of review was conceived as a kind of extraordinary remedy. However, subsequent years reveal the further development of this institution into a more or less normal stage of procedure, its limits subject to continual fluctuations. The right to file the protest was at one time extended to more numerous groups of officers and then again restricted. The extent of such review is by no means settled at the present time,

[45] Ukrainian Supreme Court, Civil Appellate Division, Decision of October 27, 1924; R.S.F.S.R. Supreme Court, Civil Appellate Division, Decision of March 21, 1925, *in re* Nikolaevsky District Child Welfare Board, see Fischman, The Course of Proceedings in a Civil Case (in Russian 1926) 340.

in view of conflicting provisions of the Code of Civil Procedure on the one hand and the Judiciary Act of 1938 on the other.

In 1925, the R.S.F.S.R. Commissar for Justice ruled that if a provincial government attorney refused to file for a party a protest for the reopening of a case, the party might lodge an appeal with the Deputy Attorney General and, in case of his refusal, might appeal to the Attorney General himself.[46] Thus, the participation of litigants in these proceedings was tacitly admitted, and an extrajudicial remedy was indirectly afforded the parties. Furthermore, in 1926, the same Commissar ruled that, with the permission of provincial attorneys, protests might also be filed by the district (rayon) attorneys.[47] On July 5, 1926, all the sections of the Code of Civil Procedure regulating reopening were substantially amended.[48] The President of the Supreme Court was granted the right to file the motion for reopening of cases decided by any court in the R.S.F.S.R., and the presidents of the provincial courts received the same right with regard to cases decided by the courts of their respective provinces. Motions were to be heard and cases reviewed, not only by the Supreme Court, but also by the provincial courts, whenever cases decided originally by the people's courts were concerned. Yet, the filing of a motion for ex officio reopening of the case was limited to a period of one year from the date of rendering of the decision. In the same year, however, the Commissar for Justice ruled that, in exceptional cases,

[46] Circular Letter of the R.S.F.S.R. Commissar for Justice No. 259/-1925, *op. cit.* 343.

[47] Circular Letter of the R.S.F.S.R. Commissar for Justice No. 15/26, *op. cit.* 342.

[48] Act of July 5, 1926, R.S.F.S.R. Laws 1926, texts 315, 666, new version of Sections 254, 254 *a-c*.

the Attorney General may file the motion after the expiration of the one year period,[49] and in 1927 the Supreme Court held that this limitation in general does not apply to motions of the Attorney General and the President of the Supreme Court.[50] The amendment of 1926 also reformulated the grounds for motion in a somewhat restricted manner, stating that it is permissible in cases of "*particularly* essential violation of the laws in force or a *plain* violation of the interests of the workers' and peasants' State and the toiling masses *contrary to the direct requirements of the statutes*" (Section 254 *b*).[51] However, the last eight words were deleted in 1929.[52]

In 1929 and 1930, another extension of the right to file a protest was admitted.[53] The right was granted to the Commissar for Justice, and the right of the district attorneys to move for the reopening of cases within their districts was incorporated in the Code. On the other hand, a substantial restriction was placed upon the motions of local officers—the provincial and district attorneys and the presidents of the provincial courts. The motions of these attorneys were to be filed within three months after the judgment had been rendered and those of the presidents of the provincial courts within six months. Some other minor changes were also introduced. The right to obtain the record of any case for inspection from any court within their jurisdiction was

[49] Circular Letter of the R.S.F.S.R. Commissar for Justice No. 199/26 (1926) Soviet Justice No. 45, Code of Civil Procedure, Dadiants, editor (in Russian 1928) 296.

[50] R.S.F.S.R. Supreme Court, Plenary Session, Protocol No. 5, March 7, 1927 (1927) Judicial Practice No. 5, Dadiants, *op. cit.*, note 49 at 297.

[51] R.S.F.S.R. Laws 1926, texts 315, 666. (Italics supplied.)

[52] See the present text of Section 254 *b*.

[53] Act of November 20, 1929, R.S.F.S.R. Laws 1929, text 851; Act of October 30, 1930, *id.* 1930, text 655.

recognized as belonging to all officers authorized to file the motion. Some of them had the right to suspend execution of the judgment against which the motion was filed.

However, "outrageous red tape and lack of stability of court judgment" was officially recognized to be the result of these rules.[54] It occurred quite frequently that the same case was ex officio reviewed by five or six different courts on motion of various officers and each time the judgment was suspended. Therefore, in 1938 the whole procedure was reformed, this time in order to restrict the ex officio reopening of a decided case. But this was done in a rather confusing manner. No direct amendment of the Code of Civil Procedure was enacted but new rules were incorporated in the Judiciary Act of 1938,[55] which prevails over the codes of civil pro-

[54] Kleinman, *op. cit. supra*, note 23 at 272, 273.
The following case involving housing illustrates the situation. The plaintiff, owner of a small house, brought a suit on October 15, 1936 for eviction of his relatives, three women and a man, who occupied a room nine square yards large in his house. They lived in the house for six years, paying no rent, but were registered as permanent tenants. The plaintiff needed the room for his tubercular son. The people's court ordered eviction, and the appellate division of the city court (equivalent to a regional court) sustained the decision. Thereupon, the appellate procedure was over, but the reopenings began. The presidium of the city court reopened the case and held for the defendants. The President of the R.S.F.S.R. Supreme Court moved for the reopening of the case, and the court reversed the last decision and confirmed the eviction. The same court again reopened the case on motion of the R.S.F.S.R. Attorney General but confirmed its previous decision. Then the federal Attorney General moved for reopening of the case before the U.S.S.R. Supreme Court, which ordered the eviction in November, 1938. Thus, within two years six different decisions of various courts were rendered, and the plaintiff's son, for whom the plaintiff needed the room, died in the meantime. (1938) Soviet Justice No. 23/24, 83.

[55] Sections 15, 16, 51, 64 and 74. For translation see Vol. II, No. 36. The text of Sections 254 through 254 *d* of the Code of Civil Procedure affected by the act is translated in Vol. II, No. 44, as it stands on the statute books, but obsolete passages are placed in brackets.
Act of January 15, 1931, R.S.F.S.R. Laws 1931, text 105, the only act amending, since 1930, the Code of Civil Procedure and dealing with ex officio reopening, did not contain any substantial changes.

cedure enacted by state legislation (U.S.S.R. Constitution, Section 20). The change affects two points. First, neither the Commissar for Justice, the presidents of provincial (regional) courts, nor provincial or district attorneys have the right to move for the reopening of cases.[56] Secondly, only the supreme courts may hear the motion for reopening of cases and review them. The U.S.S.R. Supreme Court may review any case, in particular those decided by the supreme courts of the constituent republics. The supreme court of each republic may reopen any case decided within that republic. Provincial (regional) courts and the supreme courts of the autonomous republics may not reopen cases which have once been decided.

It seems, however, that the right of local judicial officers to move for reopening of cases ex officio, though deprived of statutory authority, has been resurrected in another form. A joint Order of the federal Commissar for Justice and the federal Attorney General of September 19, 1938, stated emphatically that local judicial officers "are not relieved of their duty to supervise the correctness and uniformity of the application of laws by the courts." The courts were ordered to send records as before to the district and provincial (regional) attorneys, to those of the autonomous republics, and to the presidents of the provincial (regional) courts and supreme courts of the autonomous republics for inspection. These judicial officers were ordered, should they deem the judgment "illegal or not well

[56] This conclusion from Sections 51 and 64 of the act is stated plainly in the joint Order of the U.S.S.R. Commissar for Justice and the U.S.S.R. Attorney General of September 19, 1938, No. 77/1251, see Collection of Orders of the Office of the U.S.S.R. Attorney General in Force on December 1, 1938 (in Russian 1939) 249; Code of Civil Procedure (1943) 218.

founded," to report such opinion to the next higher attorney general or president of the court, suggesting that a protest be filed.[57]

Thus, at present, only the supreme courts are authorized to reopen a case ex officio. Only the attorneys general and the presidents of the supreme courts may file a motion (protest) for such reopening, but the presidents of the provincial and similar courts and the local government attorneys may, as before, inspect the case and move for such reopening before their superiors. Execution of a protested judgment may be suspended only by those officers who have the authority to file the motion for reopening of the case.

No statistics regarding the use of this remedy in civil cases are available. With respect to criminal cases, Vyshinsky, then the U.S.S.R. Attorney General, stated that in 1934 the motion was filed in from 40 to 73 per cent of the cases examined in various parts of the Soviet Union, and that the motion was granted in practically 100 per cent of such instances.[58]

III. Reopening of a Case by Reason of Newly Discovered Circumstances

A case in which a final decision has been rendered may be reopened if new circumstances are discovered, which have an essential bearing on the case and which were not known, and could not have been known to the party. In such instances the petition for reopening is presented to the regional (provincial) court and decided by it.

[57] *Ibid.*

[58] For the Reconstruction and Improvement of the Work of the Courts and Attorneys (in Russian 1934) 48.

The case may also be reopened if a court judgment has established that there occurred in the case false testimony of witnesses, criminal acts of parties, their counsel or experts, or criminal acts of the judges participating in the case; likewise, if the judgment in the case is based on documents which have been subsequently judicially declared a forgery, or if the decision of another court upon which the judgment is based has been set aside. In such instances, the reopening of the case falls within the jurisdiction of the court which originally tried the case on the merits (Code of Civil Procedure, Sections 250–252).

The case may be reopened on petition of a party, in which instance the petition must be presented within one month from the date on which he learned of the circumstance serving as a basis for reopening. The case may be also reopened on motion of the President of the R.S.F.S.R. Supreme Court, the president of the respective provincial (regional) court, the Attorney General, provincial and district attorneys. No particular period of limitation is stated in the Code for such motions.

It may be noted that the reopening of cases by reason of newly discovered circumstances is outlined in the soviet Code essentially in accord with other procedural codes of Continental Europe, including the imperial Russian Code of 1864.[59] The imperial Code also allowed such reopening on motion of a third party who had a legal interest in the case and in case the decision was rendered against a defendant whose residence was unknown. The soviet provisions depart from the imperial by a shorter period within which reopening may be petitioned, viz., one month against four months under the

[59] Code of Civil Procedure of 1864, Sections 187, 188, 794, 795.

imperial law, which also precluded any reopening after the expiration of ten years from the time the judgment was rendered.[60] The imperial Code also made it plain that these periods were equally binding both upon the parties and the government attorneys. No right to petition for reopening was given to judges.

IV. Conclusion

The imperial Russian appellate procedure, patterned after the French, was the starting point of the development of the soviet appeal. The early soviet enactments dropped the intermediate appellate court and sought to do away with the re-examination of a case on the merits by a superior court. The soviet appellate court was designed in 1923 to function as a cassation court, reviewing only errors in law. Hence the appellate procedure is still called cassation-revisional procedure. But a broader and more indefinite task was assigned to the appellate court by later amendments. This was eventually formulated in the Judiciary Act of 1938 as the duty to ascertain whether the judgment of the lower court is not only "legally correct" but also "well founded."[61] This task induces the soviet appellate court to review the case on the merits, invariably entering the examination of questions of fact, which involves evaluation of evidence, including the credibility of witnesses. This is the general impression one gets from the reading of soviet court reports. Thus, the soviet appellate court appears now not only as a court of cassation and revi-

60 *Id.*, Sections 191, 192, 796, 797, 806.

61 It is interesting to note that this soviet formula defining the task of the appellate court is very close to the imperial formula as in force before 1864. See Section 533, Laws of Civil Procedure, Code of Laws, Vol. X, Part 2 (1857 ed.); Section 2532, *id.*, Part 1 (1842 ed.).

sion; it also performs the same task of a complete review of the case as the intermediate appellate court did under the imperial law. But in contrast to the latter, the soviet court has to rely exclusively on the record of evidence taken in the lower court. This record, especially regarding the testimony of witnesses, is not a plausible substitute for a direct hearing, particularly because stenographic records are seldom taken in soviet courts. The soviet legislators wished to eliminate review on the merits by a superior court but in the last analysis allow such review to a superior court inadequately equipped for the task.

The growth of the ex officio reopening of finally decided cases shows that soviet appellate procedure does not work effectively. This reopening is unquestionably a most unfortunate feature of soviet judicial procedure. It returns the appellate procedure to the path abandoned, with good reason, in 1864. In view of a wide practice of ex officio reopening, it may be considered as the true appellate procedure, compared to which the regular appeal is only a preliminary stage. Thus, the appellate procedure begins in an open session with the participation of the litigants, but it may then go on indefinitely behind closed doors as a purely internal concern of the government attorneys and courts.

Although in principle soviet civil procedure permits one appeal only to the next higher tribunal, in fact, a party may succeed in causing the review of a case by two or more additional higher courts. But the party has no direct access to these high courts. He must petition various judicial officers who have a discretionary power to deny the petition. These officers may also proceed entirely of their own accord, even against the will

of any of the parties to the case. This practice undermines the stability of judgments rendered under the soviet civil procedure. It makes the whole of the civil procedure more akin to an administrative than a judicial process.

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